98

Supreme Court, U.S.
FILED

No. 08-9

JUN 26 2008
OFFICE OF THE CLERK
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IN THE

Supreme Court of the United States

REUBEN WALTER THOMPSON AND PATRICIA J. THOMPSON; AND LEONARD W. JORDAN

Petitioners

v.

UNITED STATES TRUSTEE, REGION 8

Respondent

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court below improperly restricts the inherent authority of the court in contravention of the venue scheme applicable to cases under Title 11 of the United States Bankruptcy Code and recognized by the Supreme Court in *Marrama v. Citizens Bank of Massachusetts*, 127 S. Ct. 1105 (U.S. 2007)?

II. Whether the Court below erroneously applied the holdings in *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992)?

III. Whether the Court below elevates the language and suggestion of an advisory opinion to a procedural Rule above clear congressional policy and statutory language, as expressed through the plain language and overarching scheme of the Bankruptcy Code?

RULE 29.6

Petitioners, pursuant to Rule 29.6, state that it is not a privately held company. There is no publicly held corporation, not a party to the appeal, which has a financial interest in the outcome.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....i

RULE 29.6.....ii

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....1

JURISDICTION.....1

RELEVANT PROVISIONS INVOLVED.....2

STATEMENT.....8

REASONS FOR GRANTING THE PETITION.....11

CONCLUSION.....20

APPENDIX

Circuit Court Opinion Denying Petition for Rehearing(3/28/2008).....25

Circuit Court Opinion (11/8/2007).....27

District Court Opinion (10/31/2006).....43

District Court Order Consolidating Cases (11/22/2004).....66

Bankruptcy Court Opinion; In re Thompson (8/25/2004).....68

Bankruptcy Court Second Supplemental Memorandum and Opinion; In re Jordan (8/12/2004).....
....70

TABLE OF AUTHORITIES

CASES **Page**

Citizens & Southern Nat. Bank v. Bougas,
434 U.S. 35 (1977).....12

Connecticut National Bank v. Germain,
503 U.S. 249 (1992).....i, 10, 13, 16, 17

Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., Etc., 529 U.S. 193 (2000).....12

Davis v. Michigan Dep't of Treasury,
489 U.S. 803 (1989).....11, 12

EEOC v. Arabian American Oil Co.,
449 U.S. 244 (1991).....12

Fourco GlassCo. v. Transmirra Products Corp.,
353 U.S. 222 (1957).....12

Kelly v. Robinson, 479 U.S. 36 (1986).....12

Lehigh Valley Coal Co. v. Yensavage, 218 F. 547
(CA2 1914).....13, 14

Marrama v. Citizens Bank of Massachusetts,
127 S. Ct. 1105 (2007).....i, 10, 14, 16, 18

N. Pipeline Constr. Co. v. Marathon

Pipe Line Co., 458 U.S. 50 (1982).....12, 14, 20, 21

In re Jordan, 313 B.R. 242
(Bankr. W.D. Tenn. 2004).....9, 20

Russello v. United States, 464 U.S. 16
(1983).....12

United States v. Boucha, 236 F.3d 768
(6th Cir. 2001).....16, 17

United States v. Morton, 467 U.S. 822
(1984).....11, 12

United States v. Ron Pair Enterprises, Inc.,
489 U.S. 235 (1989).....11, 12

United States Savings Association v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365
(1988).....12

Wood v. United States, 41 U.S. 342 (1842).....17

Wisconsin Public Intervenor v. Mortier,
501 U.S. 597(1991).....14

STATUTES:

28 U.S.C. §1254(1)(2008).....1

28 U.S.C. §1404(2008).....2

28 U.S.C. §1406
(2008).....2, 10, 11, 12, 13, 14, 15, 16, 18, 19, 21

28 U.S.C. §1408
(2008).....2, 3, 8, 10, 14, 15, 17, 18, 19, 21, 22

28 U.S.C. §1412
(2008).....3, 8, 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

Former 28 U.S.C. §1472(1983).....3

Former 28 U.S.C. §1473(1983).....3

Former 28 U.S.C. §1474(1983).....4

Former 28 U.S.C. §1475(1983).....4, 13, 14, 21

Former 28 U.S.C. §1476(1983).....4

Former 28 U.S.C. §1477(1983).....4, 11, 12, 13, 14, 21

Former 28 U.S.C. §1479(1983).....4

MISCELLANEOUS

Federal Rule of Bankruptcy Procedure 1001
(2008).....4, 22

Federal Rule of Bankruptcy Procedure 1014
(2008).....5, 8, 13, 15, 16, 21, 22

Federal Rule of Bankruptcy Procedure 9030 (2008).....5, 6, 22

S. Rep. No. 55, 98th Cong., 1st Sess. 19-20 (1983).....6, 17, 18

Federal Rule of Bankruptcy Procedure 1014 Advisory Committee Note (1987).....6, 7, 19, 22

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 49 BCD 14 (6th Cir. 2007). The opinion of the United States District Court for the Western District of Tennessee, Western Division is reported at 2006 WL 332845(W.D. TN 2006). The opinion for the United States Bankruptcy Court for The Western District of Tennessee, Western Division *(In re Jordan)* is reported at 313 B.R. 242 (Bankr. W.D. Tenn. 2004). The opinion for the United States Bankruptcy Court for The Western District of Tennessee, Western Division (*In re Thompson*) is unreported.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit, affirming the decision of the district court's order affirming the Bankruptcy Court's Judgment in *In Re Macdonald* and *In Re Thompson* and Reversing and Remanding the Bankruptcy Court's Judgment in *In Re Jordan*, was handed down on November 8, 2007. A timely petition for rehearing was denied on March 28, 2008. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

28 U.S.C. §1404(2008): Change of venue.

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. §1406(2008): Cure or waiver of defects.

(a) The district court of a district in which is filed a case laying in venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

28 U.S.C. §1408(2008): Venue in cases under Title 11.

Except as provided in section 1410 of this title, a case under title 11 may be commenced in the district court for the district-

> (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one hundred and eighty day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the

United States, of such person were located in any other district; ...

28 U.S.C. §1412(2008): Change of venue.

A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties.

Former 28 U.S.C. §1472(1983): Venue of cases under title 11.

Except as provided in section 1474 of this title, a case under title 11 may be commenced in te bankruptcy court for a district-

(1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the 180 days immediately preceding such commencement, or for a longer portion of such 180-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; ...

Former 28 U.S.C. §1473(1983): Venue of proceedings arising under or related to cases under title 11.

Former 28 U.S.C. §1474(1983): Venue of cases ancillary to foreign proceedings.

Former 28 U.S.C. §1475(1983): Change of venue.
A bankruptcy court may transfer a case under title 11 or a proceeding arising under or related to such a case to a bankruptcy court for another district, in the interest of justice and for the convenience of the parties.

Former 28 U.S.C. §1476. Creation or alteration of district or division.

Former 28 U.S.C. §1477(1983): Cure or waiver of defects.
(a) The bankruptcy court of a district in which is filed a case or proceeding lay venue in the wrong division or district may, in the interest of justice and for the convenience of the parties, retain such case or proceeding, or may transfer, under section 1475 of this title, such case or proceeding to any other district or division.

Former 28 U.S.C. §1479(1983): Provisional remedies; security.

Federal Rule of Bankruptcy Procedure 1001(2008): Scope of Rules and Forms; Short Title.
The Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code....These rules shall be construed to secure the

just, speedy, and inexpensive determination of every case and proceeding.

Federal Rule of Bankruptcy Procedure 1014(2008): Dismissal and Change of Venue.

(a) Dismissal and Transfer of cases.

(1) **Cases filed in proper district**. If a petition is filed in a proper district, on timely motion of a party in interest, and after hearing on notice to the petitioners, the United States Trustee, and other entities as directed by the court, the case may be transferred to any other district if te court determines that the transfer is in the interest of justice or for the convenience of the parties.

(2) **Cases filed in improper district**. If a petition is filed in an improper proper district, on timely motion of a party in interest, and after hearing on notice to the petitioners, the United States Trustee, and other entities as directed by the court, the case may be transferred to any other district if tc court determines that the transfer is in the interest of justice or for the convenience of the parties.

Federal Rule of Bankruptcy Procedure 9030(2008): Jurisdiction and Venue Unaffected.

These rules shall not be construed to extend or limit the jurisdiction of the courts or the venue of any matters therein.

S. Rep. No. 55, 98th Cong., 1st Sess. 19-20 (1983):
"...In keeping with its policy of generally preserving the structure and substance of the 1978 Act, the Committee makes very few changes in current venue provisions. Sections 1472, 1473, 1474, and 1475 are virtually identical to corresponding sections of the 1978 Act, with the exception of providing for venue in the district courts rather than in the bankruptcy courts. It should be noted that section 1475 regarding change of venue has been slightly modified to provide for such change 'in the interest of justice or for the convenience of the parties.' Present law uses the conjunctive 'and' ....in light of the broad in personam jurisdiction which Federal courts possess in the bankruptcy area, largely as a result of the 1978 Act, district courts should always give careful consideration to the convenience of the parties on determining whether a change of venue is desirable.... Certain other sections of the 1978 Act have been deleted entirely. These include ... section 1477 dealing with cure or waiver of defects...Sections 1476, 1477,and 1479 of the 1978 Act were repetitive of other provisions of Federal Law..."

Federal Rule of Bankruptcy Procedure 1014 Advisory Committee Note(1987):
"Formerly, 28 U.S.C. §1477 authorized a court either to transfer or retain a case which had been commenced in a district where venue was improper. However, 28 U.S.C. §1412, which supercedes 28

U.S.C. §1477, authorizes only the transfer of a case. The rule is amended to delete the reference to retention of a case commenced in the improper district. Dismissal of a case commenced in the improper district as authorized by 28 U.S.C. §1406 has been added to the rule. If a timely motion to dismiss for improper venue is not filed, the right to object is waived."

STATEMENT

This appeal arises out of Motions to Dismiss filed by the United States Trustee for Region 8 (Kentucky and Tennessee) for improper venue in the bankruptcy cases of Reuben Walter and Patricia J. Thompson, and Leonard W. Jordan. In each case, the debtors conceded that venue in the Bankruptcy Court for the Western District of Tennessee was not technically proper under 28 U.S.C. §1408(2008), but asserted that the bankruptcy court has concurrent jurisdiction to review the particular facts and circumstances of their case to determine whether, pursuant to 28 U.S.C. §1412 and Fed. R. Bankr. P 1014(a)(2), their case should be (1)transferred to any other district for further administration; (2) dismissed "for cause" under title 11 sections 707(a),1112(b), or 1307(b)(2008); or (3) retained for further administration. Both sets of debtors argued that the ultimate decision as to the disposition of their cases should rest upon the judicial determination of whether retention would be in the interest of justice or convenience of the parties, furthering the judicial goals set forth in Fed. R. Bankr. P. 1001 which is to "secure the just, speedy, and inexpensive determination of every case and proceeding."

The United States Bankruptcy Court for the Western District of Tennessee is located in Memphis, Tennessee and the United States Bankruptcy Court for the Northern District of Mississippi is located in Aberdeen, Mississippi. Mr. and Mrs. Thompson are residents of Olive Branch, Mississippi and live approximately 26 miles from the bankruptcy court in Memphis, Tennessee and approximately 121 miles from the bankruptcy court in Aberdeen, Mississippi. The creditors in the Thompson case consist of one national credit card creditor, the Internal

Revenue Service and 16 "local" creditors from Memphis, Tennessee and Olive Branch, Mississippi and Southaven, Mississippi. Their mortgage lien holder, Mr. And Mrs. Reel, also Olive Branch residents, live approximately 26 miles from Memphis, Tennessee and approximately 122 miles from Aberdeen, Mississippi. Mr. Thompson is self employed and his clients are located in the immediate area of Memphis, Tennessee, Olive Branch, Mississippi and Southaven, Mississippi. Mr. Jordan lives approximately 16 miles from Memphis, Tennessee and approximately 134 miles from Aberdeen, Mississippi. The creditors in the Jordan case consist of eight national creditors and one creditor located in Memphis, Tennessee. Mr. Jordan has no Mississippi creditors. Mr. Jordan works for a temporary service and is sent to jobs in the immediate area of Memphis, Tennessee and Southaven, Mississippi. No creditors or other parties in interest for either case have appeared in support of the United States Trustees' Motions to Dismiss or Transfer Venue.

In *In re Thompson*, the Bankruptcy Court for the Western District of Tennessee entered a Memorandum Opinion and Order on August 25, 2004, granting the Trustee's motion and transferring the case. In *In re Jordan*, the Bankruptcy Court for the Western District of Tennessee entered a Memorandum and Supplemental Memorandum Opinion denying the Trustee's motion.

The Thompsons appealed the bankruptcy court's opinion and the U.S. Trustee appealed the Jordan opinion to the United States District Court for the Western District of Tennessee which affirmed the decision of the Bankruptcy Court in *In re Thompson* and reversed the decision in *In re Jordan*. The debtors in *In re Thompson and the* debtor in *In re Jordan*, appealed to the United States Court of Appeals for the Sixth Circuit. The cases were consolidated for the purposes of appeal on January 16, 2007. The Sixth Circuit issued an Opinion on November 8, 2007, affirming

the decision of the district court. Petitioners timely filed a request for rehearing which was denied on March 28, 2008.

This Petition seeks to have the Court review the lower courts improper restriction of the inherent authority of the bankruptcy court in contravention of the venue scheme applicable to cases under Title 11 of the United States Bankruptcy Code and recognized by the Supreme Court in *Marrama v. Citizens Bank of Massachusetts*, 127 S. Ct. 1105 (U.S. 2007). This Petition also seeks to require proper application of the holding in *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992) when rendering an opinion on the statutory interpretation of these statutes. This Petition also seeks review of the lower court's decision which elevates the language of an advisory opinion above clear congressional policy as expressed through the plain language and overarching scheme of the Bankruptcy Code. Petitioners seek to have the Court require the lower court to interpret and apply bankruptcy specific venue statutes 28 U.S.C. §1408, entitled Venue of cases under Title 11 and 28 U.S.C. §1412, entitled Change of venue to Title 11 cases as opposed to general venue statute 28 U.S.C. §1406, which applies to District Court or State Court cases.

The decision of United States Court of Appeals for the Sixth Circuit conflicts with Supreme Court decisions *Marrama v. Citizens Bank of Massachusetts*, 127 S. Ct. 1105(U.S. 2007) and *Connecticut National Bank v. Germain*, 503 U.S. 249(1992) and consideration by the United States Supreme Court is therefore necessary to secure and maintain uniformity.

REASONS FOR GRANTING THE PETITION

It is important to note that the cases presented here are not merely examinations of procedure, rather the cases present vital examples of bankruptcy cases filed across this nation. There may not be a split of decisions at the Circuit court level, but the issue cries out for a national precedent to alleviate any allegations of forum shopping in Title 11 cases. These cases are a representation of a wide variety of both business and consumer bankruptcy cases; of honest but unfortunate debtors who need to secure an inexpensive and timely remedy to the financial crisis they find themselves in. The decision of this honorable Court would impact not only voluntarily filed consumer cases such as these, but also the voluntarily filed commercial cases. The underlying decision in the Sixth Circuit impacts not only voluntary cases but also involuntary cases. The myriad of decisions at the district and bankruptcy court level in other circuits provide fertile ground for forum shopping, ultimately impacting the ideal of a national bankruptcy law.

As to the first question presented for review, the lower Court disregards the stated intent of Congress and the long-standing flexible venue scheme of cases under Title 11. The primary basis for the holding in the lower Court's decision is that the gap left when 28 U.S.C. § 1477 was repealed in the 1984 restructuring was filled by 28 U.S.C. § 1406. The unfortunate connotation here is that section 1406 was a new section in the restructuring, or if not, that somewhere in the legislative history of Congress an intention was expressed that section 1406 fill the gap left by the repeal. In so holding, the lower Court has not reinforced the longstanding flexible venue provision of cases under Title 11. In contravention to *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) (citing *United States v. Morton*, 467 U.S. 822, 828 (1984); *United States v.*

Ron Pair Enterprises, Inc., 489 U.S. 235 (1989), *Fourco Glass Co. V. Transmirra Products* Corp., 353 U.S. 222 (1957); *Citizens & Southern Nat. Bank v. Bougas*, 434 U.S. 35, (1977); *EEOC v. Arabian American Oil Co.*, 449 U.S. 244 (1991); *United States Savings Association v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988); *Kelly v. Robinson*, 479 U.S. 36 (1986); and *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., Etc.* , 529 U.S. 193, (2000) , the lower Court's decision disregards the stated intent of Congress and the long-standing flexible venue scheme of cases under Title 11.

The venue provisions of cases under Title 11 of the United States Bankruptcy Code were restated and moved in association with the "restructuring" in 1984 necessitated by the Supreme Court's decision in *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). This historical context becomes important and is indeed a logical extension of the statutory examination disregarded in the cases the lower court cites as the "majority" because 28 U.S.C. §1406 and Former 28 U.S.C. §1477 coexisted harmoniously prior to this restructuring, but each section had drastically different results and application. Statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words in a statute must be read in their context and with the view of their place in the overall statutory scheme. *Davis v. Michigan Dept. Of Treasury*, 489 U.S. 803, 809 (1989)(citing *United States v. Morton*, 467 U.S. 822, 828 (1984)). [*See* also *Russello v. United States*, 464 U.S. 16, 23 (1983), "Where Congress includes particular language in one section of a statute but omits it another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."] Section 1406 was in existence prior to the repeal of section 1477; Congress explicitly stated in the legislative history associated with the repeal of section 1477 that there was *no*

intention to change the statutory scheme in the restructuring of 1984. In addition section 1406 and the repealed section 1477 had drastically different results and application leading to the logical interpretation that there is no intent for section 1406 to fill the gap left by the repeal of section 1477. This is not simply the case of overlapping statutes in the case of 1406 and 1412 as the lower Court states; rather it is the overall statutory scheme that is in direct opposition to the lower Court's holding. Section 1406 did not, and still does not, allow for the retention of a case, however repealed section 1477 did allow for retention as did the companion section under the prior statutory scheme, former 28 U.S.C. §1475. Section 1475 was ostensibly brought into 28 U.S.C. §1412 which allows for a change of venue in cases under Title 11 to any other district.

The lower Court correctly held that a case that is properly venued in the first instance could be transferred to a district in which it could not have originally been brought under section 1412 and Federal R. Bankr. P. 1014, if in the interests of justice or for the convenience of the parties; and that fixing this problem, if any, should be left to Congress. However, Congress has already addressed the question before this court in that the duplication of repealed sections 1475 and 1477 was addressed by drafting and implementing section 1412 to deal with the two repealed sections. Congress did not make a distinction between cases with proper or improper venue in section 1412 as was set forth in repealed sections 1475 and 1477. Specifically, Congress ensured that the language of section 1412 was generic enough that it would apply to both cases filed under Title 11 in proper and improper venue. As recognized favorably in *In re Germain*, Judge Learned Hand advises that statutes "should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them." *Germain* at 255, n. 1 (citing *Lehigh Valley Coal Co. V. Yensavage*, 218 F. 547, 553 (CA2 1914), cert.

denied, 235 U.S. 705 (1915)). Surely congress did not expect that an advisory Committee Note to a procedural rule would override a longstanding and flexible venue scheme for cases under Title 11; in addition to their stated intention that the changes were being made purely in response to the Supreme Court's *Marathon* decision and not as a drastic change to the overall statutory scheme. "Common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it" when rendering an opinion on the statutory interpretation of these statutes. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 611, n.4 (1991)). The plain language of the existing statutes without the context, within which they came into existence, is not sufficient in deciding this important case.

In short, Congress condensed former 28 U.S.C. §§1475 and 1477 together into sections 28 U.S.C. §§1408 and 1412, drafting these sections broadly to deal with *all* cases under Title 11. In stating that there was no intention to change the statutory scheme, the court should give deference to that intention and hold that section 1412, not section 1406, applies to cases filed under Title 11 in a "non-proper" venue.

As to the second question presented for review, the lower Court's holding calls into question the venue of cases in ALL bankruptcy cases, consumer cases as well as business cases, whether filed voluntarily or involuntarily. The decision disregards the inherent authority of the court in contravention to the Supreme Court's holding in *Marrama v. Citizens Bank of Massachusetts*, 127 S. Ct. 1105 (U.S. 2007). The lower Court's holding does not address the instance where when Congress takes a stated right away, the inherent authority of the court steps in. A closer examination of 28 U.S.C. §1412 and Fed. R. Bankr. P. 1014 is required for the lower Court's holding to be deemed sound as to venue in all bankruptcy cases.

This holding, by implication, creates a rule that if a party in interest makes a timely motion for a change of venue in a properly venued case, bankruptcy courts *must* transfer the case to another district. The lower Court holds that the venue provisions of 28 U.S.C. §1406 are mandatory and that Fed. R. Bankr. P. 1014(a)(2) must be interpreted as authorizing the transfer of cases filed in an improper venue ONLY to a district in which the case could have been originally brought and ONLY in the interest of justice. The lower Court states that 28 U.S.C. §1412 and Fed. R. Bankr. P. 1014(a)(1) are in harmony and do not conflict. Closer examination of section 1412 and rule 1014(a)(1) shows that there is no authority to retain a case; that is retention has not been authorized by either the statute or the Rule. In fact, under the restructuring in 1984, the creation of section 1412 and restatement of Rule 1014(a), retention is nowhere explicitly authorized by statute or rule. Logically, the court should and does have the authority to retain a properly venued case, however the holding in this case would not allow for any such inference as it is not explicitly provided for in the text of the statute or the rule.

The lower Court holds that if a remedy, right or procedure is not explicitly authorized by statute than it is not allowed. Inherent authority is exactly that area of the law that is left open. If Congress restructures certain sections of the law and drafts the replacing statutes so broadly as to imply that a right is still within the inherent authority of the court, the statute should be read to include that inherent authority. 28 U.S.C. §§1408 and 1412 are written broadly enough to address both change of venue in a properly and an improperly venued case and the inherent authority to retain a case is implicit in the broad wording of the statute. Reading the statute as narrowly as the lower Court would have the courts do, has broad implications as to venue in ALL bankruptcy cases.

This holding was intended to simplify the venue scheme, but has indeed made it much more unwieldy. Under this holding, in a properly venued case a court may retain a case, though it is not stated in the text of the statute or the underlying rule; and in a technically improperly venued case the specific statutory scheme of the bankruptcy code is inapplicable and the general venue statue is binding but the underlying rule provides for more than is purportedly authorized by statute. That is, if a case is not filed in the proper venue and a timely motion is filed the trial court would look first to the general venue statute (section 1406) and find that the court may not retain the case based on the plain text of the statute. Further when the trial court then refers to the procedural rule (Rule 1014(a)(2)), the court can only consider the interest of justice, even though the rule specifically states that the convenience of the parties should also be considered. On the one hand, the lower Court would have trial courts bound by the strict language of the statute (section 1406) and on the other hand allow the inherent authority of the court to retain a case, though not explicitly set forth in the statute (section 1412). This holding further complicates venue decisions and binds the courts hands in many instances that were not intended by Congress and are in contradiction to the goal of the Bankruptcy Code and further disregards the inherent authority of the court as recognized by this Court in *Marrama*, thereby calling into question venue in ALL bankruptcy cases.

As to the third question presented for review, the lower Court's decision in reliance upon the language of *United States v. Boucha*, 236 F.3d 768, (6th Cir. 2001) cannot be supported by the Panel's further reliance on *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992). In Germain, this Honorable Court held that two overlapping statutes must both be given effect so long as there is no 'positive repugnancy' between them. Germain at

253 (quoting *Wood v. United* States, 41 U.S. (16 Pet.) 342, (1842). The lower court further states that "§1406 applies on it's face, and clearly prohibits a court from refusing to transfer or dismiss a bankruptcy case where venue is lacking. The lower Court's reliance that "the language of the statute ... should be the end point if the plain meaning of that language is clear," is inappropriate when the court further looks to the advisory committee note to a procedural rule as further support for its position but totally disregards Congress' stated intent and the overall venue scheme for cases under Title 11. *United States v. Boucha*, 236 F.3d 768, (6th Cir. 2001). The lower court ignores the plain language of 28 U.S.C. §1408 which provides that title 11 cases **may** be commenced in a proper venue and 28 U.S.C. §1412 providing for change of venue for cases or proceedings under **title 11** to a district court for another district, in the interest of justice or for the convenience of the parties.

The lower Court initially relies upon *Boucha* for the proposition that the plain language is clear. The Supreme Court in *Germain* stated that reliance solely on the plain language with ignorance of other available information is inappropriate. *Connecticut National Bank v. Germain,* 503 U.S. 249 (1992). Yet the lower Court looks at the plain language, then disregards the statutory scheme in place in 1984 and Congress' stated intent that the restructuring in 1984 was in no way meant to change the overall statutory scheme.

> "...In keeping with its policy of generally preserving the structure and substance of the 1978 Act, the Committee makes very few changes in current venue provisions. Sections 1472, 1473, 1474, and 1475 are virtually identical to corresponding sections of the 1978 Act, with the exception of providing for venue in the district courts rather than in the

> bankruptcy courts. It should be noted that section 1475 regarding change of venue has been slightly modified to provide for such change 'in the interest of justice or for the convenience of the parties.' Present law uses the conjunctive 'and' ....in light of the broad in personam jurisdiction which Federal courts possess in the bankruptcy area, largely as a result of the 1978 Act, district courts should always give careful consideration to the convenience of the parties on determining whether a change of venue is desirable.... Certain other sections of the 1978 Act have been deleted entirely. These include ... section 1477 dealing with cure or waiver of defects...Sections 1476, 1477, and 1479 of the 1978 Act were repetitive of other provisions of Federal Law..."

S. Rep. No. 55, 98th Cong., 1st Sess. 19-20 (1983). Instead, the lower court then cites to the language of an Advisory Committee Note. (Opinion at 4-5). Though the Note should be considered, it is inappropriate to have the Note trump congressional intent and the inherent authority of the court. *Marrama v. Citizens Bank of Massachusetts,* 127 S. Ct. 1105 (U.S. 2007).

Different venue standards and levels of permissiveness or restrictiveness must be recognized in the interpretation of Title 28 U.S.C. §§1406(a), 1408, 1410, 1412. To do otherwise, ignores the subtle differences of the statutes and results in the controlling venue statute for title 11 cases to be §1406(a) instead of §1408 entitled Venue of cases under title 11 and §1412 entitled Change of venue as promulgated by congress. The view that the only remedies available to the bankruptcy court upon a determination of improper venue are dismissal or transfer

of the case to another district, leaving no discretion to retain the case in the venue in which it was filed renders §§1408 and 1412, bankruptcy specific venue statutes at least partially superfluous. 28 U.S.C. §1408 defines proper venue for cases filed under title 11, which is decidedly more permissive than the language found in 28 U.S.C. §1406, which governs venue in district court civil actions. The contrasting language of 28 U.S.C. §§1406, 1408, 1410, and 1412 is indicative of the different venue standards or levels of permissiveness or restrictiveness that must be recognized in the interpretation and application of these statutes. Congressional construction of bankruptcy statutes use permissive and non exclusive language, providing the bankruptcy courts the inherent and implicit authority to retain cases filed in an improper venue, or proper venue, if in the interest of justice or convenience of the parties. To not recognize the inherent authority of the bankruptcy court to retain a technically improperly venued case in the interest of justice or convenience of the parties is to simply apply 28 U.S.C. §§1404 and 1406(a) to determine whether venue is proper and if not proper to dismiss or transfer the case to a proper district without regard to the bankruptcy specific venue statutes of 28 U.S.C. §§1408 and 1412. Further, placing deference on a 1987 Advisory Committee Note to Bankruptcy rule 1014 that contains specific reference to 28 U.S.C. §1406 and directly conflicts with the permissive statutory language of sections 1408 and 1412. Rule 1014 (a) (2) and it's accompanying advisory committee note go beyond the scope of the enabling statutes and essentially purport to modify or enlarge the statutory provisions of 28 U.S.C. §1412 through procedural legislation and is in direct conflict with Fed. R. Bankr. P. 9030. Congressionally mandated statutes supersede Federal Bankruptcy Rules of Procedure and their Accompanying Advisory Committee Notes.

It is a dangerous proposition for the court to impose upon the statutes a desired result that is in conflict with the stated intent of Congress. Congress specifically restructured the venue provisions in 1984 to respond to the Supreme Court decision in *Marathon*. In no way was the restructuring meant to drastically change the flexible venue provisions that are afforded cases under Title 11. Cases under Title 11 are dealt with in a manner that ensures the expediency of the bankruptcy estate and thereby reducing the attendant costs associated with any lengthy legal process. To create a per se rule that provides an opportunity for prolonged litigation and an unchecked opportunity for parties in interest to dictate over the interest of justice or the convenience of ALL the parties in a case is inappropriate.

Petitioners urge this Honorable Court to reverse the lower Court's opinion and hold that the Court in *In re Jordan*, properly held that the court did have the authority to retain a technically improperly venued bankruptcy case in the interest of justice or for the convenience of the parties; that there is nothing in Title 28, Title 11, or the Federal Rules of Bankruptcy Procedure that prohibit this retention and that 28 U.S.C. §1412 applies to all cases under Title 11 in regard to change of venue, regardless of whether venue was initially proper or not. Further, Petitioners submit that the development of a convoluted venue scheme is not supported by tenants of statutory interpretation, legislative history, or logic.

CONCLUSION

To properly interpret and apply Title 11 of the United States Bankruptcy Code, an examination of the legislative history and consideration of statutory construction within the distinctive framework of the

bankruptcy courts is necessary. Prior to the 1984 amendments, which were in response to the *Marathon* decision, a bankruptcy court's options were the same for cases filed in the right venue and for cases filed in the wrong venue. The change of venue, former 28 U.S.C. §1475 applied to cases pending in the proper venue. The cure of waiver or defects statute, former 28 U.S.C. §1477, which expressly allowed the court to retain a bankruptcy case in the wrong venue in the interest of justice and for the convenience of the parties, or transfer the case to any other district. The bankruptcy court did not have the option to dismiss a bankruptcy case solely on the ground of incorrect venue. Section 1477 mirrored the rules laid down by former section 1475, the change of venue statute for bankruptcy cases. In the 1984 amendments, Congress repealed and did not replace section 1477 to eliminate this perceived repetition. Further, Congress made clear that it did not intend to substantively alter the venue statutes through the amendments. Applying 28 U.S.C. §§1408 and 1412 with the permissive language in which it was written continues to recognize the unique nature of bankruptcy cases and its inherent and implicit authority to retain a case filed in a technically improper venue. This is the only application that renders former section 1477 repetitious and recognizes congress' intention to make no substantial change in the venue statutes by the 1984 amendments. Significantly, section 1406 requires the case be dismissed, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought. Rule 1014(a)(2) states the case may be dismissed or transferred to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties. The interpretation that section 1406 is applicable to bankruptcy cases originally filed in an improper venue creates a conflict between Rule 1014(a)(2) and section 1406, as well as thwarts the goals enumerated

in Fed. R. Bankr. P. 1001 and the stated policy of the U.S. Trustee, respondent.

Rule 1014(a) and the accompanying advisory committee note essentially modify or enlarge the statutory provisions of 28 U.S.C. §1412. Section 1412 does not provide for dismissal of a bankruptcy case and is silent as to whether an improperly venued case may be retained through procedural legislation. Section 1412 is in conflict with Federal Rule of Bankruptcy Procedure 9030 which explai8ns that the Federal Rules of Bankruptcy are not to be construed to extend or limit jurisdiction or venue.

The 1984 amendments and the newly enacted bankruptcy venue statutes 28 U.S.C. §§1408 and 1412, with their permissive statutory scheme and corresponding Rule 1014 are sufficient in addressing venue issues in cases filed under Title 11. The lower court's decision ignores congressionally mandated judicial goals in Rule 1001 and the long standing trend of flexibility under the Bankruptcy Code. For the above and foregoing reasons, Petitioners respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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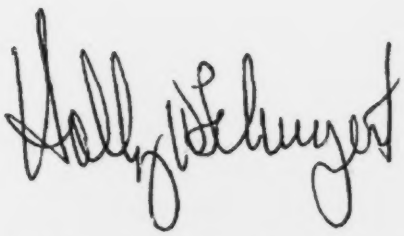
CERTIFICATE OF SERVICE

I declare under penalty that three copies of the foregoing Petition for Writ of Certiorari were served on June 16, 2008 on the following via First Class, Postage Prepaid U.S. Mail.

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Holly W. Schumpert



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APPENDIX

Nos. 06-6430/6519

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REUBEN WALTER THOMPSON AND PATRICIA J. THOMPSON (06-6430); AND LEONARD W. JORDAN (06-6519),

Petitioners – Appellants,

v.

MADALYN S. GREENWOOD, ET AL.,

Respondents – Appellees.

ORDER

BEFORE: BOGGS, Chief Judge; MARTIN and SUTTON, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

Filed March 28, 2008
ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

REUBEN WALTER THOMPSON and PATRICIA J. THOMPSON (06-6430); and LEONARD W. JORDAN (06-6519),

Petitioners-Appellants,

v.

MADALYN S. GREENWOOD, et al.,

Respondents-Appellees.

Nos. 06-6430/6519

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
Nos. 04-02765; 04-02766; 04-02979—
Bernice B. Donald, District Judge.

Argued: September 10, 2007

Decided and Filed: November 8, 2007

Before: BOGGS, Chief Judge; and MARTIN and SUTTON, Circuit Judges.

COUNSEL

ARGUED: Holly W. Schumpert, LAW OFFICE OF HOLLY W. SCHUMPERT, Memphis, Tennessee, for Appellants. Kelsi Brown Corkran, UNITED STATES DEPARTMENT

OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Holly W. Schumpert, LAW OFFICE OF HOLLY W. SCHUMPERT, Memphis, Tennessee, Steven F. Bilsky, Memphis, Tennessee, for Appellants. Jonathan H. Levy, William Kanter, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

OPINION

BOGGS, Chief Judge. This consolidated appeal arises from a Title 11 bankruptcy action brought on behalf of two sets of debtors, all of whom are residents of the Northern District of Mississippi, who filed their actions in the Western District of Tennessee (Memphis Division) for reasons of convenience. The United States Trustee's Office for the Northern District of Mississippi moved to transfer the cases. This case presents a single issue on appeal: whether a bankruptcy court may retain a case filed in an improper venue under 28 U.S.C. § 1408 over a timely objection by an interested party, if it determines that retention is in the interests of justice or for the convenience of the parties. The district court answered that question in the negative and ordered the cases transferred to the Northern District of Mississippi. We affirm.

I

Debtors Reuben and Patricia Thompson and Leonard Jordan ("the debtors"), all of whom reside in the Northern Mississippi suburbs of Memphis, filed voluntary petitions for bankruptcy in the United States Bankruptcy Court for

the Western District of Tennessee in June 2004. In both cases, the United States Trustee in the Northern District of Mississippi filed motions to dismiss or transfer on the ground that venue was lacking because the debtors did not reside in the district, as required by 28 U.S.C. § 1408. Although the debtors conceded, both then and now, that venue in Tennessee was "technically improper," Appellants' Br. at 9, they maintained that, both as a matter of statutory construction and for equitable reasons, the bankruptcy judges had inherent authority to retain the cases in the interest of justice or for the convenience of the parties. The Trustee argued that a proper interpretation of the applicable venue statutes left the judge with no discretion to retain the cases, and that the court was required either to dismiss or transfer the cases under the plain language of 28 U.S.C. § 1406.

The decisions of the bankruptcy judges in the two cases were contradictory. In the case of Mr. Jordan, Chief Bankruptcy Judge David S. Kennedy agreed with the debtor's position, holding that "the court, in its discretion, pursuant to its inherent or implicit authority, . . . may retain 'cases' filed in an improper district 'for the convenience of the parties' or 'in the interest of justice' even if a timely motion is filed to contest venue . . . ." *In re Jordan*, 313 B.R. 242, 264 (Bankr. W.D. Tenn. 2004). In contrast, in the case of the Thompsons, Bankruptcy Judge Jennie D. Latta, relying on the reasoning of her prior decision in *In re McDonald*, 219 B.R. 804 (Bankr. W.D. Tenn. 1998), found that venue was not proper in the Western District of Tennessee and ordered the case transferred to Mississippi. Both cases were appealed to the District Court for the Western District of Tennessee, which thoroughly analyzed the applicable venue statutes and determined that the Trustee's position was "the most coherent reading of the statute as a whole in conformity

with accepted norms of statutory construction." *In re MacDonald*, 356 B.R. 416, 428 (W.D. Tenn. 2006). The court therefore affirmed Judge Latta's ruling in *In re Thompson* and reversed Chief Judge Kennedy's ruling in *In re Jordan*. *Id.* at 429. The debtors then appealed to this court.

This issue has divided the lower courts, with a decided majority siding with the Trustee's interpretation. *See, e.g., U.S. Trustee v. Sorrells* (*In re Sorrells*), 218 B.R. 580 (B.A.P. 10th Cir. 1998); *Swinney v. Turner*, 309 B.R. 638 (M.D. Ga. 2004); *Peachtree Lane Assocs. v. Granader* (*In re Peachtree Lane Assocs.*), 188 B.R. 815 (N.D. Ill. 1995); *Micci v. Bank of New Haven* (*In re Micci*), 188 B.R. 697 (S.D. Fla. 1995); *EDP Med. Computer Sys. v. United States* (*In re EDP Med. Computer Sys.*), 178 B.R. 57 (M.D. Pa. 1995); *In re Great Lakes Hotel Assocs.*, 154 B.R. 667 (E.D. Va. 1992); *ICMR, Inc. v. Tri-City Foods*, 100 B.R. 51 (D. Kan. 1989); *In re Ross*, 312 B.R. 879 (Bankr. W.D. Tenn. 2004) (Judge William H. Brown); *In re Pannell*, 243 B.R. 23 (Bankr. S.D. Ohio 1999); *In re McDonald*, 219 B.R. at 806 (Judge Jennie D. Latta); *In re Columbia Western, Inc.*, 183 B.R. 660 (Bankr. D. Mass. 1995); *In re Petrie*, 142 B.R. 404 (Bankr. D. Nev. 1992); *In re Sporting Club at Ill. Ctr.*, 132 B.R. 792 (Bankr. N.D. Ga. 1991); *In re Pick*, 95 B.R. 712 (Bankr. D.S.D. 1989); *In re Townsend*, 84 B.R. 764 (Bankr. N.D. Fla. 1988). A minority of courts, however, favors the debtors' interpretation. *See, e.g., U.S. Aviex Co. v. Aviex Int'l, Inc.* (*In re U.S. Aviex Co.*), 96 B.R. 874 (N.D. Ind. 1989); *In re Brazzle*, 321 B.R. 893 (Bankr. W.D. Tenn. 2005) (Judge G. Harvey Boswell); *In re Jordan*, 313 B.R. at 264 (Chief Judge David S. Kennedy); *In re Capital Hotel Group*, 206 B.R. 190 (Bankr. E.D. Mo. 1997); *In re Lazaro*,

128 B.R. 168 (Bankr. W.D. Tex. 1991).[1] No other circuit court of appeals appears to have addressed this issue. We agree with the majority interpretation for the reasons that follow, and adopt it as the rule in this circuit. We therefore affirm.

II

"In a case which comes to us from bankruptcy court by way of an appeal from a decision of a district court, we review directly the decision of the bankruptcy court." *Brady-Morris v. Schilling* (*In re Kenneth Allen Knight Trust*), 303 F.3d 671, 676 (6th Cir. 2002). "[W]e apply the clearly erroneous standard to the bankruptcy court's findings of fact, and we review de novo the bankruptcy court's conclusions of law." *Ibid.* In the present case, the facts are undisputed and the question is purely one of the proper interpretation of the applicable venue statutes.

A

As this court has recognized, a fundamental canon of statutory construction is that "when interpreting statutes,

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[1] There are also a number of pre-1987 cases supporting the debtors' view. *See, e.g., In re Baltimore Food Sys.*, 71 B.R. 795 (Bankr. D.S.C. 1986); *In re Boeckman*, 54 B.R. 110 (Bankr. D.S.D. 1985); *In re Leonard*, 55 B.R. 106 (Bankr. D.D.C. 1985); *see also In re Jordan*, 313 B.R. at 261 (citing these cases in support of the minority position). These older authorities are less persuasive because, as will be explained *infra*, they were all decided prior to the 1987 Advisory Committee Note to Federal Rule of Bankruptcy Procedure 1014, which clearly favors the majority interpretation. Indeed, the same judge who decided *In re Boeckman* in 1985 later decided *In re Pick*, 95 B.R. 712 (Bankr. D.S.D. 1989) (adopting the majority interpretation), and cited the 1987 note in support. *Id.* at 715.

the language of the statute is the starting point for interpretation, and it should also be the ending point if the plain meaning of that language is clear." *United States v. Boucha*, 236 F.3d 768, 774 (6th Cir. 2001) (internal quotation omitted). Venue in a Title 11 case is governed by 28 U.S.C. § 1408, which reads, in pertinent part:

> [A] case under title 11 may be commenced in the district court for the district . . . in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement . . . .

28 U.S.C. § 1408 (2006). Under this standard, the debtors concede that venue is not proper in the Western District of Tennessee, or, at least, not "technically" proper. Appellants' Br. at 9. Improperly venued cases are governed by 28 U.S.C. § 1406, which is headed "Cure or waiver of defects" and instructs:

> (a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.
>
> (b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to venue.

28 U.S.C. § 1406(a)-(b) (2006). Although this section does not specifically mention Title 11 bankruptcy cases, its broad language plainly encompasses all improperly venued cases of whatever variety. Presumably, since bankruptcy judges "constitute a unit of the district court," 28 U.S.C. § 151 (2006), this includes Title 11 cases.[2] Therefore, under § 1406, if a case is brought in an improper venue and an interested party[3] timely objects, a district court has only two options: (1) dismiss the case, or (2) transfer the case to a jurisdiction of proper venue, if it be in the interest of justice.

The debtors, however, argue that § 1406 is inapplicable to bankruptcy cases because another, more specific provision applies—§ 1412, which is headed "Change of venue" and reads: "A district court may transfer a case or proceeding under title 11 to a district court for another

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[2] The debtors attempt to parse the word "case" to show that a bankruptcy "case" is not the same thing as a district court "case" as that term is used in § 1406, and thus § 1406 does not apply. Appellants' Br. at 16-17; *see also In re Jordan*, 313 B.R. at 249-50, 255 (making a similar argument and concluding that the "provisions of . . . § 1406 that are applicable in the United States district court do *not* apply to bankruptcy 'cases' under the Bankruptcy Code"). While we recognize that there are differences between bankruptcy cases and civil cases more generally, this alone is hardly a compelling reason to conclude that the word "case" in § 1406 has a different meaning from the word "case" used just two sections later in § 1408 ("[A] case under title 11 may be commenced in the district court . . . ."). Rather, we conclude that bankruptcy cases, like other cases, are encompassed by the plain language of § 1406.

[3] The United States Trustee is an interested party by statute. *See* 11 U.S.C. § 307 (2006) ("The United States Trustee may raise and may appear and be heard on any issue in any case or proceeding under this title . . . ."); *see also In re Miles*, 330 B.R. 848, 849-51 (Bankr. M.D. Ga. 2004) (holding that the Trustee has standing to bring a motion to dismiss or transfer a Title 11 case due to improper venue).

district, in the interest of justice or for the convenience of the parties." 28 U.S.C. § 1412 (2006). The debtors argue that the use of the term "may" implies that the court is not *required* to transfer a case, but may also retain it. *See In re Jordan*, 313 B.R. at 256 (quoting *In re Lazaro*, 128 B.R. at 168, 172-74, which in turn quotes *In re Boeckman*, 54 B.R. at 111: "[T]he permissive language used in Section 1412 . . . merely says that a district court 'may' transfer a case to another district; it does not say it must transfer the case . . . ."). While at first glance this might appear to be a plausible interpretation, it erroneously assumes that § 1412 applies to both properly and *improperly* venued cases. If this assumption were accurate, and the debtors' interpretation adopted, it would render § 1408 a nullity, or at least significantly diminish its importance. Under such an interpretation, parties would be free to disregard the venue strictures of § 1408 and file their Title 11 cases in any court in the country, so long as the bankruptcy judge thought the choice of venue just or convenient—factors nowhere mentioned in § 1408. Because courts must "give effect, if possible, to every clause and word of a statute rather than . . . emasculate an entire section," *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (internal quotation omitted), the better interpretation is that § 1412 applies only to bankruptcy cases that are properly venued in the first instance; § 1406 applies to improperly venued cases This makes sense given that § 1406 governs "[c]ure or waiver of [venue] defects," whereas § 1412 merely governs "[c]hange of venue." Thus, § 1412 is no "more specific" in application to this case than is § 1406.

Federal Rule of Bankruptcy Procedure 1014, though not carrying the weight of a statute, also supports this interpretation. The rule implements the provisions of both § 1406 and § 1412 under the heading "Dismissal and Change of Venue," and divides cases into two groups:

(1) Cases filed in proper district

If a petition is filed in a proper district, on timely motion of a party in interest, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the case may be transferred to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties.

(2) Cases filed in improper district

If a petition is filed in an improper district, on timely motion of a party in interest and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the case may be dismissed or transferred to any other district if the court determines that transfer is in the interest of justice or for the convenience of the parties.

Fed. R. Bankr. P. 1014(a). Thus, part (a)(1) of the rule provides that if a case is properly venued, it may be transferred (in accord with § 1412). Part (a)(2) states that if, on the other hand, the case is improperly venued, it may be dismissed or transferred (in accord with § 1406). As in § 1412, the use of seemingly permissive language ("*may* be transferred," rather than "*must* be transferred") could be interpreted as granting the court authority to also *retain* the case. It could, that is, if such an interpretation were not explicitly foreclosed by the rule's accompanying advisory note:

> Formerly, 28 U.S.C. § 1477 authorized a court either to transfer or retain a case which had been commenced in a district where venue was improper. However, 28 U.S.C. § 1412, which supersedes 28 U.S.C. § 1477, authorizes only the transfer of a case. The rule is amended to delete the reference to retention of a case commenced in the improper district. Dismissal of a case commenced in the improper district as authorized by 28 U.S.C. § 1406 has been added to the rule.

Fed. R. Bankr. P. 1014 advisory committee's note. The advisory note makes clear that, since the repeal of 28 U.S.C. § 1477,[4] which explicitly permitted retention of an improperly venued case, there is no longer any authority for such retention, and only dismissal or transfer of the case is authorized. While we acknowledge that this note

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[4] 28 U.S.C. § 1477 formerly governed venue in bankruptcy cases. It clearly authorized bankruptcy courts to retain improperly venued case in the interest of justice or for the convenience of the parties. *See* 28 U.S.C. § 1477 (1982) (repealed). Unfortunately for the debtors, it was repealed as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, which restructured the bankruptcy courts following the Supreme Court's decision in *Northern Pipeline Const. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) (holding that the bankruptcy courts constituted an impermissible delegation of Article III judicial powers to non-Article III courts). It is unclear precisely why § 1477 was repealed. *Compare In re Jordan*, 313 B.R. at 253 n.11, 255 (noting that the legislative history is "sparse" but suggesting that the repeal may have been a drafting oversight caused by Congress's rush to resolve the jurisdictional problems caused by *Northern Pipeline*) *with In re MacDonald*, 356 B.R. at 425 (adopting "a presumption of fundamental legislative competence on the part of Congress" and concluding that the repeal was purposeful). Whatever the reason for its repeal, however, the simple fact is that § 1477 no longer exists, and we cannot pretend otherwise.

(and, indeed, the entire rule) must give way to conflicting statutory authority under some circumstances, *see* 28 U.S.C. § 2075 (2006) (stating that the "rules shall not abridge, enlarge, or modify any substantive right"), there is no conflict between the rule and any applicable statute on the specific question at issue in this case—whether a bankruptcy court has authority to retain an improperly venued case over the timely objection of an interested party. Both Rule 1014(a)(2) and § 1406 answer that question in the negative.

To be sure, as the district court recognized, there is some conflict between Rule 1014(a)(2) and § 1406 vis-à-vis the *transfer* of an improperly venued case. *See In re MacDonald*, 356 B.R. at 427-28. Specifically, the statute permits transfer only to a district where venue would have been proper in the first instance, and only in the interest of justice. In contrast, Rule 1014(a)(2) appears to permit transfer to "any other district," whether the case could have been brought there originally or not, and includes the "convenience of the parties" as an additional consideration. *Compare* 28 U.S.C. § 1406 *with* Fed. R. Bankr. P. 1014(a)(2). Although resolving these apparent discrepancies is not strictly necessary to render a decision in the case before us, in the interest of providing guidance to the lower courts in future bankruptcy cases, we note that the statute trumps the rule. *See* Fed. R. Bankr. P. 9030 ("These rules shall not be construed to extend or limit the jurisdiction of the courts or the venue of any matters therein."). Thus, where a bankruptcy case is brought in an improper venue, and an interested party timely objects, the court must either dismiss it or transfer it to a jurisdiction of proper venue in accordance with § 1406, notwithstanding any differing language in Rule 1014(a)(2). Note, however, that no such conflict arises with regard to cases that are *properly* venued in the first instance. *Compare* 28 U.S.C. §

1412 *with* Fed. R. Bankr. P. 1014(a)(1) (both authorizing transfer to another district, without limitation, in the interest of justice or for the convenience of the parties). Thus, a case that is properly venued in the first instance could be transferred to another district (even one where the case could not originally have been brought) in accordance with § 1412 and Rule 1014(a)(1).

Those courts adhering to the minority view take issue with this interpretation because of the seeming illogic of this rule—that a case that is filed in an improper venue must be dismissed or transferred to a proper venue, but one that is first filed in a proper venue can be transferred to a district where venue is improper. *See, e.g.*, *In re Lazaro*, 128 B.R. at 172 ("It is an odd construction indeed to maintain that New Mexico would be free to transfer this case to the Western District of

Texas . . . , but that the Western District of Texas is not free to retain the self-same case."). We, however, are inclined to agree that "[t]he statutory scheme . . . merely recognizes that it is the role of the 'home' court to make [the] determination [whether to transfer a case to another district]." *In re Petrie*, 142 B.R. at 407. Whether this framework is the best way to manage venue in bankruptcy cases is not for us to decide; it is enough that the textual authority inescapably leads to our conclusion. Thus, we agree "that fixing any perceived problem is a job for Congress and not the courts." *Swinney*, 309 B.R. at 641.

B

Those courts adhering to the majority view, including the district court here, have found interpretive guidance in *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992), in which the Supreme Court faced a

similar problem of statutory construction. *See, e.g.*, *In re MacDonald*, 356 B.R. at 426-27; *In re Sorrells*, 218 B.R. at 586-87; *U.S. Trustee v. Swinney* (*In re Swinney*), 300 B.R. 388, 392 (Bankr. M.D. Ga. 2003). We, too, find the case instructive.

In *Connecticut National Bank*, also a bankruptcy case, the Court examined two allegedly contradictory statutory provisions that governed interlocutory appeals. 503 U.S. at 250-51. One provision was generally applicable to all cases (rather than specific to only bankruptcy cases) but directly answered the disputed question (analogous to § 1406 here). *Id.* at 251. The other provision was specific to bankruptcy cases but was textually silent on the disputed question, although the legislative history purportedly supported the view that the bankruptcy-specific statute superseded the more general statute (analogous to § 1412 here). *Id.* at 253. The Court began with the presumption that "a legislature says in a statute what it means and means in a statute what it says," *id.* at 253-54, and observed that "so long as there is no positive repugnancy between two laws, . . . a court must give effect to both." *Id.* at 253. The Court held that, even though the two sections overlapped to some extent, there was no "positive repugnancy" between them because each applied to some cases that the other did not. *Id.* Thus, the plain language of the more general statute governed the case, and the Court refused to even consider the legislative history: "When the words of a statute are unambiguous . . . judicial inquiry is complete." *Id.* at 254.

Connecticut National Bank is analogous to the case before us. Even more so than the statutes at issue in that case, there is no "positive repugnancy" between §§ 1406 and 1412—the former applies only to improperly venued cases,

and the latter applies only to properly venued ones.[5] Those courts that have examined *Connecticut National Bank* agree that its interpretive methodology supports the Trustee's view. *See In re Swinney*, 300 B.R. at 392 ("As in *Connecticut National Bank*, there is one bankruptcy specific code section that is silent [§ 1412] and one section, while not bankruptcy specific, that addresses the issue before the Court [§ 1406]. Therefore, 28 U.S.C. § 1406 applies . . . ."); *Sorrells*, 218 B.R. at 587 ("Since there is no bankruptcy-specific statute applicable to improperly venued cases, section 1406(a) must apply in bankruptcy . . . ."). It does not appear that any of those courts endorsing the opposing view have attempted to grapple with *Connecticut National Bank*. *See In re Swinney*, 300 B.R. at 392 (noting that only one case favoring the debtors' interpretation has been decided post-*Connecticut National Bank* and that that case did not address the Court's analysis).[6]

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[5] Indeed, the cases are similar enough that one could substitute "§ 1406" and "§ 1412" for the two provisions at issue in *Connecticut National Bank*:

> [J]udicial inquiry into the applicability of § [1406] begins and ends with what § [1406] does say and with what § [1412] does not. . . . [N]owhere else, whether in [§ 1412] or any other statute, has Congress indicated that the unadorned words of [§ 1406] are in some way limited by implication. "It would be dangerous in the extreme to infer . . . that a case for which the words of an instrument expressly provide, shall be exempted from its operation." *Sturges v. Crowninshield*, 4 Wheat. 122, 202, 4 L. Ed. 529 (1819) . . . .

503 U.S. at 254.

[6] The debtors address the case only on the penultimate page of their reply brief, where they appear to argue that the "positive repugnancy" spoken of in *Connecticut National Bank* in fact exists in this case.

In sum, textual analysis—especially in light of *Connecticut National Bank*—simply does not support the debtors' interpretation.

C

Because we find that the plain text of § 1406 governs this case, it is not necessary—indeed, it would be inappropriate—to explore the legislative history surrounding the repeal of former § 1477. *See Conn. Nat. Bank,* 503 U.S. at 254. Suffice it to say, the legislative history (as is so often the case) is hardly definitive one way or the other. *Compare In re Jordan,* 313 B.R. at 257 (concluding that the legislative history supports the view that Congress did not intend to change bankruptcy venue by repealing § 1477) *with In re MacDonald,* 356 B.R. at 425 (concluding that the "statutory history simply does not support the proposition that Congress intended to maintain the status quo"). Similarly, the equitable considerations cited by the debtors and those courts adhering to their viewpoint cannot trump the plain meaning of the statutory authority, even if the consequences of requiring a debtor to file his case in a proper venue were as dire as the debtors make them out to be. *See Reno v. Bossier Parish Sch. Bd.,* 520 U.S. 471, 485 (1997) ("[I]t is well established that courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.") (internal quotation omitted).

Appellants' Reply Br. at 24. As explained *supra*, however, § 1406 and § 1412 each apply to cases that the other does not, and therefore there is no repugnancy between them, as the Court defined the term.

III

For the reasons set forth above, we hold that (1) the venue requirements of 28 U.S.C. § 1408 are mandatory, not optional; (2) 28 U.S.C. § 1412 applies only to bankruptcy cases filed in a proper venue; (3) 28 U.S.C. § 1406 applies to cases, including bankruptcy cases, filed in an improper venue; and (4) Federal Rule of Bankruptcy Procedure 1014(a)(2) must be interpreted as authorizing the transfer of an improperly venued case only to a district in which the case could have originally been brought, and only in the interest of justice, in accordance with the plain language of § 1406. *See In re MacDonald*, 356 B.R. at 428. The decision of the district court is therefore AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re:
KENNEY DAVID MACDONALD,
Appellant. No. 04-2764 BBD

LEONARD W. JORDAN,
Appellant. Nos. 04-2766 BBD & 04-2979 BBD

REUBEN WALTER THOMPSON and
PATRICIA J. THOMPSON,
Appellants. No. 04-2765 BBD

ORDER AFFIRMING BANKRUPTCY COURT'S JUDGMENT IN IN RE MACDONALD AND IN RE THOMPSON AND REVERSING AND REMANDING BANKRUPTCY COURT'S JUDGMENT IN IN RE JORDAN

Before the Court are four appeals from the judgments of the United States Bankruptcy Court for the Western District of Tennessee in three separate bankruptcy cases. Because each of these appeals confronts the same fundamental legal issue, and because the relevant facts are nearly identical in the three cases, the Court has consolidated the four appeals in the interest of judicial economy. The Court herein affirms the bankruptcy court's judgment in two of the three cases, and reverses the bankruptcy court's judgment and remands in the third

case. In so ruling, the Court seeks to bring resolution to a matter of law which has sharply divided this district's bankruptcy court.

I. PROCEDURAL BACKGROUND

In mid-2004, the Office of the United States Trustee filed motions to dismiss on improper venue grounds in a number of bankruptcy cases filed in the Western District of Tennessee by residents of Arkansas and Mississippi. Several such cases were consolidated for hearing, and on August 4, 2004, Judge William Brown held that an improperly venued case cannot be retained by the bankruptcy court and must be dismissed or transferred to a district where the case could have properly been brought. See In re Ross, 312 B.R. 879, 892 (Bankr. W.D. Tenn. 2004). On the following day, August 5, 2004, Chief Judge David S. Kennedy held that an improperly venued case could be retained if the interests of justice and the convenience of the parties so required. See In re Jordan, 313 B.R. 242, 264 (Bankr. W.D. Tenn. 2004). On August 25, 2004, Judge Jennie Latta entered an order transferring the case of In re Thompson to the Northern District of Mississippi, citing In re McDonald, 219 B.R. 804 (Bankr. W.D. Tenn. 1998), in which Judge Latta had held that a case filed in a district where venue does not properly lie pursuant to 28 U.S.C. § 1408 must be either dismissed or transferred, and that a bankruptcy court has no discretion to retain such a case. McDonald, 219 B.R. at 264. The debtors appealed the order and the transfer order was subsequently stayed by this Court.

One of the debtors in the Ross case filed an appeal of the bankruptcy court's transfer.[1] This appeal, In re MacDonald, was consolidated by this Court with the appeal

[1] Two other Ross debtors also appealed. These appeals, however, were subsequently dismissed.

by the United States Trustee in In re Jordan on October 6, 2004. On November 22, 2004, the Court further consolidated the MacDonald and Jordan cases with the appeal by debtors in In re Thompson.

In the Jordan case, the United States Trustee filed an objection to the Report of No Distribution filed by the Chapter 7 Trustee in that case.[2] The objection was overruled and the U.S. Trustee filed a separate notice of appeal from that order, which was filed with this Court as Clippard v. Jordan. On December 10, 2004, the Court consolidated Clippard with the MacDonald, Jordan and Thompson cases. It is the resulting consolidation of four appeals from three separate bankruptcy cases that is presently before the Court.

II. FACTUAL BACKGROUND

The factual circumstances relevant to the contested legal issue are virtually identical among the three cases. Residents of Mississippi (hereinafter "the debtors") filed voluntary petitions for bankruptcy protection under either Chapter 7 or Chapter 13 in the Western District of Tennessee. The debtors concede that venue in the Western District of Tennessee is not technically proper, but argue that the venue requirements under federal law can be waived by the debtors. They further argue that the bankruptcy courts have legal authority to retain an improperly venued case in the interest of justice and for the convenience of the parties. The United States Trustee (hereinafter "the Trustee") argues in all three cases that the bankruptcy court lacks the legal authority to retain an

[2] The objection was based on the same grounds raised in the motion to dismiss or transfer, i.e., because the bankruptcy court did not have proper venue, the United States Trustee argued, it could not properly rule on the Chapter 7 trustee's report.

improperly venued case in the face of a timely motion of a party in interest to dismiss or transfer the case.

III. STANDARD OF REVIEW

The Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 158(a)(3) . In a bankruptcy proceeding, the district court reviews the bankruptcy court's conclusions of law *de novo* and upholds its findings of fact unless they are clearly erroneous. Nicholson v. Isaacman (In re Isaacman), 26 F.3d 629, 631 (6th Cir.1994). There is no dispute over the findings of facts in these cases. Therefore, the Court reviews the consolidated appeals before it *de novo*.

III. ANALYSIS

a. The Bankruptcy Code in Historical Context

In 1984, Congress revised the Bankruptcy Code, in response to the Supreme Court's holding in N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) that the Code impermissibly delegated Article III judicial powers to the bankruptcy courts, which under the Bankruptcy Act of 1978 were essentially independent trial courts. The revised Code granted original and exclusive jurisdiction of all bankruptcy cases to the federal district courts, and then authorized the delegation of such authority to the bankruptcy courts as adjuncts to the district courts.

The 1984 revisions also included changes to the bankruptcy venue provisions unrelated to the constitutional concerns addressed in N. Pipeline. The legislative intent and practical impact of these collateral modifications remain murky, and are at the heart of the controversies on appeal before the Court.

Under the revised Code, venue for bankruptcy cases is governed by 28 U.S.C. § 1408,[3] which provides, with exceptions not pertinent to the matter before the Court, that

> a case under title 11 may be commenced in the district court for the district—
>
> > (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district[.]

In other words, a debtor seeking bankruptcy protection may file a petition in any district where he or she currently lives, conducts a business or has principle assets. To satisfy this requirement, for all practical purposes, the debtor's residence, business or assets must have been established in the district for at least 180 days.

Section 1412, the companion "change of venue" provision to § 1408, replaced 28 U.S.C. § 1475 and allows a

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[3] Section 1408(a) of title 28 replaced 28 U.S.C. § 1472 without any substantive change to the prior provision, other than substituting "district court" for "bankruptcy court" in response to N. Pipeline.

court to "transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties."[4] Although § 1412 is virtually identical to its predecessor,[5] the scope and meaning of the new provision is the subject of considerable controversy, and is at the heart of the split between the bankruptcy judges in this district on the subject of retention of improperly venued bankruptcy cases.

Section 1477 was eliminated from the old code without any obvious replacement. This section, entitled *Cure or waiver of defects*, provided, in relevant part, that

> [t]he bankruptcy court of a district in which is filed a case or proceeding laying venue in the wrong division or district may, in the interest of justice and for the convenience of the parties, *retain such case or proceedings*, or *may transfer*, under section 1475 of this title, such case or proceeding to any other district or division."

28 U.S.C. § 1477 (2000) (emphasis added).

Another section of the federal jurisdiction and venue statute central to the present controversy is 28 U.S.C. §

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[4] "Although these statutes refer to the 'district court,' the bankruptcy court is a unit of the district court, 28 U.S.C § 151, and no one in these cases has disputed that the bankruptcy court stands in the place of the district court for purposes of the venue statutes." In re Ross, 312 B.R. 879, 884 (Bankr. W.D. Tenn. 2004).

[5] Section 1475 reads as follows: "A bankruptcy court may transfer a case under title 11 or a proceeding arising under or related to such a case to a bankruptcy court for another district, in the interest of justice and for the convenience of the parties." 28 U.S.C. § 1475 (2000). Section 1412 provides as follows: "A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." 28 U.S.C. § 1412 (2000).

1406(a), which remained unaltered as part of the 1984 revision and provides that "[t]he district court of a district in which is filed *a case* laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." (emphasis added).

The final major piece of the venue puzzle is Federal Rule of Bankruptcy Procedure 1014, which provides in part,

> *Cases Filed in Improper District.* If a petition is filed in an improper district, on timely motion of a party in interest and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the case may be dismissed or transferred to any other district if the court determines that transfer is in the interest of justice or for the convenience of the parties.

Fed. R. Bankr. P 1014(a)(2).

b. The Two Interpretations

The debtors in the three cases on appeal focus their argument for retention of their cases in this district's court on a proper reading of §§ 1408 and 1412 of Title 28 of the United States Code.[6] They concede that filing their cases in the Western District of Tennessee was not in technical compliance with the requirements of § 1408. They observe, however, that the language of § 1408 is in permissive rather than mandatory terms, i.e., it states that a case *may* be commenced in certain districts. "If Congress had intended [the statute] to require the filing of bankruptcy cases to be in only those venues that the debtor was

[6] The legal arguments of the debtors in all three cases are nearly identical and are summarized here as if they represent a single, undifferentiated body of argument.

domiciled, or had a . . . business . . . then the statute would have read 'must be commenced,' 'shall be commenced' or 'may only be commenced' . . ." (Br. Appellants R.W. and P. Thompson 11.) Since § 1408 is "merely a procedural rule," they argue, it does not "delineate what cases bankruptcy courts are competent to adjudicate." (Br. Appellant MacDonald 6.)

Judge Kennedy agreed with the debtors position on this issue, finding that "[s]tanding alone, there is nothing inherently sinister, vexatious, or contrary to accepted good faith principles about filing a bankruptcy case in a technically improper venue.[7] It should be emphasized that 28 U.S.C. § 1408 regarding case venue is permissive in nature." In re Jordan, 313 B.R. 242, 261 (Bankr. W.D. Tenn. 2004)). Judge Brown, on the other hand, found the debtors' argument unavailing, holding that it would effectively render § 1408 "meaningless." In re Ross, 312 B.R. 879, 885 (Bankr. W.D. Tenn. 2004).

If Congress had intended § 1408 as providing "mere examples" of proper venue, he asks, "wouldn't Congress have included such language as 'including but not limited to?'" Id. In Judge Brown's view, interpreting § 1408 as allowing venue "wherever the debtor is employed, or wherever the debtor has some minimal contacts, or wherever the convenience of the debtor dictates," is contrary to its plain language and would amount to impermissibe substitution of the court's policy judgment for that of Congress. Id.

Having asserted that § 1408 leaves the court with considerable discretion, the debtors next argue that the

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[7] This Court is in agreement with this sentiment and concludes that an honest but unfortunate debtor needing the immediate protection of the automatic stay may, at the outset, file in an improper venue on an emergency basis. The subsequent disposition of such an improperly venued case is governed by the pertinent statutes and regulations, as discussed in detail *infra*.

court possesses, under 28 U.S.C. §1412, the authority to retain an improperly venued case under certain, statutorily-provided circumstances. Here again, the debtors find the court's authority in the permissive nature of the statute's language rather than its substance. While § 1412 merely provides that the court "may transfer a case . . . in the interest of justice or for the convenience of the parties," to the debtors "it seems logical that if a transfer is not in the interest of justice or for the convenience of the parties, the court may also decide not to transfer the case." (Br. Appellant MacDonald 7) (quoting In re Lazaro, 128 B.R. 168, 172 (Bankr. W.D. Texas 1991).

Agreeing with this position, Judge Kennedy opined that the court not only has the discretion to hear an improperly venued case, but *must* retain such a case "if the interest of justice and the convenience of the parties do not warrant transferring the case." Jordan, 313 B.R. at 258 (quoting In re Lazaro, 128 B.R. 168, 174). His conclusion is buttressed with legislative history and principles of statutory construction. He correctly explains that the pre-1984 bankruptcy act contained provisions, 28 U.S.C. §§ 1475 and 1477, for both the transfer of properly venued bankruptcy cases and the "cure and waiver" of those cases improperly venued. Id. at 254. He notes that under § 1477, a court had the option of retaining an improperly venued case or transferring it to any other district. Id. at 255. Dismissal was not an option under this provision. Under the 1984 restructuring, § 1475 was replaced by § 1412 without substantive change, but § 1477 was omitted without an obvious replacement, creating what Judge Kennedy calls a "case venue gap." Id. He attributes the omission to "apparent legislative error." Id.

In In re Jordan, Judge Kennedy quotes extensively from In re Lazaro, and explicitly adopts the reasoning contained therein regarding the proper construction of §1412. Jordan, 313 B.R. at 262. Lazaro holds that "the most

probable intention of Congress was to streamline the language and not to make a substantive change." 128 B.R. at 173 (quoting In re Leonard, 55 B.R. 106, 109-10 (Bankr. Colo. 1985)). Therefore, given the "maximum flexibility" that is "the hallmark for venue issues in Title 11 cases," it should be assumed that Congress intended for § 1412 to govern both properly and improperly venued cases, implicitly preserving the court's authority of retention in an improper forum formerly conveyed in § 1477. Id. at 173.

Judge Kennedy also scrutinizes Rule 1014(a) of the Federal Rules of Bankruptcy Procedure, "which now purports to implement 28 U.S.C. § 1412 . . . whether the transferee court is a proper venue or not." Id. at 258. He concludes that Rule 1014(a)(2) and its accompanying Advisory Committee Note "go far beyond the scope of the enabling statute" by addressing dismissal and retention issues. Id. at 259. By prohibiting retention and allowing dismissal, Judge Kennedy asserts, the Rule modifies or enlarges the provisions of § 1412 in violation of Fed. R. Bankr. P. 9030, which forbids any construction of the Federal Rules of Bankruptcy Procedure that extends or limits the jurisdiction of the courts or the venue of any matters therein, and 28 U.S.C. § 2075, which provides that the Bankruptcy Rules "shall not abridge, enlarge, or modify any substantive right." Id. at 260, 262. Judge Kennedy further concludes that Rule 1014(a)(2) is contrary to the spirit of Fed. R. Bankr. P. 1001, which seeks to "secure the just, speedy, and inexpensive determination of every case and proceeding." In light of his findings,

Judge Kennedy held Rule 1014(a)(2) to be "impermissible procedural legislation."

In sharp contrast, Judge Brown scarcely mentions § 1412. Unlike Judge Kennedy, he assumes the validity of Rule 1014(a)(2), and relying on its plain language, states simply that "the Court is not given the option of retaining the improperly venued case." In re Ross, 312 B.R. 879, 891

(Bankr. W.D.Tenn. 2004) (quoting Judge Brown's prior decision in In re Berryhill, 182 B.R. 29, 31 (Bankr. W.D. Tenn. 1995)). He also cites In re McDonald as authority for the proposition that "a combination of 28 U.S.C. § 1412's venue transfer provisions and Rule 1014 require[] a conclusion that the court receiving an improperly venued case [does] not have the option of retaining that case when presented with a timely venue motion." Id.

In In re McDonald, the decision upon which In re Thompson is based, Judge Latta addresses the In re Lazaro reasoning head on. 219 B.R. 804 (Bankr. W.D. Tenn. 1998). She finds that the Lazaro court "added a lot of substance into section 1412 which does not exist on its face," and that "the history of section 1412 supports the majority rule that that section does not authorize a bankruptcy court of improper venue to retain a case." Id. at 806 (quoting In re Sorrells, 218 B.R. 580, 585-87 (B.A.P.10th Cir. 1998)) (internal quotations omitted). An important element in the McDonald ruling was the conclusion that "since section 1412 and section 1475 are so similar, section 1412 should have the same scope as section 1475." Id. (quoting Sorrells, 218 B.R. at 586). "Since there is no bankruptcy-specific statute applicable to improperly venued cases, section 1406(a) must apply in bankruptcy, requiring such a case to be dismissed or, if it be in the interest of justice, transferred to a court in which venue is proper." Id.

Echoing this finding in McDonald, the Trustee focuses its arguments for transfer and against retention almost entirely on the proper interpretation and application of 28 U.S.C. § 1406(a) in the context of bankruptcy cases. The Trustee presents an analytic structure starkly at odds with that presented by the debtors and articulated in In re Jordan, and relies extensively on the reasoning contained in In re Swinney, 300 B.R. 388 (Bankr. M.D. Ga.), aff'd, 309 B.R. 638 (M.D. Ga. 2004), for its determination that § 1406 has full

application in bankruptcy cases. (Br. Appellee, In re MacDonald 7-9.) The Trustee concludes that the bankruptcy courts are therefore bound by the terms of § 1406 and under those terms have no discretion to retain cases filed in the wrong venue. Id. at 8.

According to the Trustee, the plain language of Fed. R. Bankr. P. 1014 and the Advisory Committee Note to that rule provides further evidence of the validity of the Swinney view of §§ 1406 and 1412. The Trustee observes that Rule 1014 sets up a neat division between "Cases Filed in Proper District," provided for in section (a)(1), and "Cases Filed in Improper District," provided for in section (a)(2). The language of section (a)(1) mirrors the language of § 1412, whereas the language of section (a)(2) reflects that of § 1406(a). The accompanying Advisory Committee Notes underscores the intention behind the rule: "The rule is amended to delete the reference to retention of a case commenced in the improper district. Dismissal of a case commenced in the improper district as authorized by 28 U.S.C. Sec. 1406 has been added to the rule."

Judge Kennedy observes that both §§ 1404 and 1406 permit the transfer of cases only to a district in which the case *"could have been brought,"* whereas § 1412 contains no such restrictive clause, implying that for bankruptcy cases transfer is permissible to *any* district. Jordan, 313 at 255. This distinguishing characteristic is reflective of the fact that "[v]enue considerations in bankruptcy *cases* are decidedly quite different from venue issues involving specific civil action litigation," leading Judge Kennedy to conclude unequivocally that § 1406 does not apply to bankruptcy cases under title 11. Id. at 255-56.

Judge Brown's decision in In re Ross, contains no mention of § 1406, relying instead on the "plain language" of § 1408 and Rule 1014(a)(2) to conclude that "the Court is

not given the option of retaining the improperly venued case." 312 B.R. at 891 (quoting Berryhill, 182 B.R. at 31).

c. Synthesis

While sharp disagreement characterizes the debate over the proper application of the venue provisions in bankruptcy cases, there is one issue upon which there seems to be near universal agreement: Congress's intent in altering the bankruptcy venue provisions is not altogether clear, and the clues as to that intent are scant in both the legislative record and in the words of the statutory provisions themselves. The Court takes this crumb of consensus as its starting point in constructing a resolution to the present controversy.

Several principles of statutory construction are clearly apropos in guiding the Court as it proceeds from this point of departure. First is the presumption that Congress "says in a statute what it means and means in a statute what it says there." Conn. Nat. Bank v. Germain, 503 U.S. 249, 254 (1992). This "cardinal canon" instructs the Court to begin its task of resolution of the dispute over the meaning of a statute with the language of the statute itself. Id.; United States v. Ron Pair Enter., Inc., 489 U.S. 235 (1989).

This canon is particularly applicable in the construction of 28 U.S.C. § 1408. The provision sets forth with considerable specificity the venue requirements for filing a case under title 11, and is the sole provision governing venue in bankruptcy cases. If venue is to have any meaning at all in a bankruptcy context, the Court must consider the terms of § 1408 as providing legal constraints on bankruptcy filing, not mere suggestions.

The Court finds unpersuasive the debtors' interpretation of § 1408's use of the word "may" in the phrase "may be commenced." While "may" does convey

permission, it is doubtful that its use here was intended to imply that a bankruptcy case may be commenced anywhere at all. A statute must be construed to avoid absurdity, Holy Trinity Church v. United States, 143 U.S. 457, 460 (1892), and under the interpretation suggested by the debtors § 1408 would be rendered quite devoid of meaning. If the permissive term has any significance at all in this context, it is only that bankruptcy filings under title 11 are voluntary rather than mandatory. While the statute would have been clearer still if Congress had chosen to insert the word "only" after "may," it is nonetheless amply clear that § 1408 conveys the precise venue requirements Congress intended to impose upon debtors seeking bankruptcy protection.[8]

Unfortunately, the conclusion that Congress "said what it meant and meant what it said" in § 1408 provides only the tiniest step forward on the road to resolving the controversy before the Court. The debtors, after all, concede that the venue in which they filed was improper, or at least "technically improper." A properly narrow reading of §1408 lends credence to the proper/improper dichotomy embodied in Rule 1014, but it contributes little toward a determination of the scope of the bankruptcy court's authority regarding such improperly venued cases.

Beneath the sea of words contained in the briefs and opinions before the Court lies a single essential conundrum: when Congress eliminated § 1477 from the Bankruptcy Act, what provision did Congress intend to take its place in governing improperly venued cases and proceedings? The

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[8] The parallel venue provision governing civil actions, 28 U.S.C. § 1391, frequently, but not uniformly, uses "may . . . be brought *only*." See 28 U.S.C. § 1391(a) - (c) (2000). In § 1391(e), providing for venue where defendant is a government official, however, the words "may . . . be brought in any judicial distict," are used. In the context of this statute at least, it appears that "only" is merely used for emphasis, without altering the substance or scope of the provision.

debtors argue, relying on Judge Kennedy's ruling in Jordan and decisions by a vocal minority of the bankruptcy courts, that since there is no evidence that Congress intended to depart substantially from the prior version of the Act, it must have intended for the substance of § 1477 to be imbibed into the new § 1412. The Trustee avers, relying on the reasoning of Judge Latta and numerous other courts, that § 1406 is the heir apparent of § 1477 rather than § 1412.[9] Based on this assertion, the Trustee concludes that the court is precluded from retaining improperly venued cases. From this perspective of the statute, § 1412 merely replaces former § 1475, and applies only to bankruptcy cases filed in the proper venue pursuant to § 1408.

Can this Court presume, as some have, that Congress intended no "substantive change" in the 1984 revisions? See Lazaro, 128 B.R. at 173. Or should the Court presume, as others have suggested, that Congress must have simply erred in its omission of § 1477 without an appropriate replacement, creating a "venue gap"? See Jordan, 313 B.R. at 255. This Court finds both of these presumptions to be unwarranted and illadvised.

The Court chooses to adopt, first and foremost, a presumption of fundamental legislative competence on the part of Congress. Furthermore, the Court recognizes that the repeal of § 1477 without a replacement stands in stark contrast to the close pairing, without substantial revision, of the predecessor/successor provisions of §§1472/1408 and §§ 1475/1412. The Court must assume that the markedly different treatment of § 1477 was purposeful, and looks to the structure that Congress left in place to divine that purpose. It is guided in this effort by the principle that

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[9] Judge Brown's In re Jordan opinion supports the Trustee's position on § 1406 only indirectly: by deferring to Rule 1014 as precluding retention, Judge Brown is implicitly adopting the Advisory Committee's statement that the amended Rule 1014(a)(2) incorporates § 1406.

statutory construction is "a holistic endeavor." United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd. 484 U.S. 365, 371 (1988).

> A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme-because the same terminology is used elsewhere in a context that makes its meaning clear, . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."

Id.

Prior to the 1984 revision to the Bankruptcy Code, venue was governed primarily by two trios of statutory provisions:[10] for civil actions, 28 U.S.C. § 1391 set forth the general requirement for proper venue; § 1404 addressed the transfer of properly venued civil actions; and § 1406 provided for dismissal or transfer of improperly venued cases. For bankruptcy cases, § 1472 was the venue provision; § 1475 covered transfer of properly venued cases and proceedings; and § 1477 addressed those improperly venued, allowing for retention or transfer, but not dismissal.

With the 1984 revision, only the provisions for venue of bankruptcy cases and proceedings were changed. For the most part, the statutory changes consisted solely of the substitution of "district court" for "bankruptcy court," in conformity with N. Pipeline. As previously mentioned, Section § 1472 was replaced by § 1408 without substantial change; § 1475 was replaced by § 1412 without substantial change; and § 1477 was repealed without an obvious replacement.

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[10] In the interest of clarity, provisions which are not pertinent to the present controversy are not included in this brief summary.

This statutory history simply does not support the proposition that Congress intended to maintain the status quo. If it had intended to do so, the obvious course would have been to replace § 1477 with another provision with nearly identical language, merely substituting "bankruptcy court" with "district court," as it did with §§ 1472 and 1475. That a different course was chosen is a strong indication that a different outcome was intended.

The notion that Congress collapsed its treatment of properly and improperly venued cases into the single sentence of § 1412 appears equally implausible. If, as the Court has determined, § 1408 is intended to distinguish properly venued cases from those improperly venued, then it would be incongruous for the statute to treat these two categories of cases as if they were one.

Section 1477 expressly granted the court, in special circumstances, authority to retain improperly venued cases. This *Cure or waiver of defects* section maintained harmony with the *Venue* provision by establishing an explicit exception to the restrictions on venue contained therein. Implicit in the relationship between §§ 1472 and 1477 was the idea that without such an express statutory exception the court would be without the authority to hear a case filed in violation of the venue statute.

The debtors' construction of §1412, piggybacking transfer of improperly venued cases onto the provision governing properly venued ones, is in marked discord with this fundamental principle. It assumes an implicit authority which Congress formerly found necessary to make explicit. Because this interpretation effectively renders the venue provision inoperative, it is unavailing. The Court therefore concludes that § 1412 must be construed to have the same scope as its predecessor, i.e., it governs only the transfer of cases and proceedings filed in a proper venue under § 1408.

The alternative statutory interpretation proffered by the Trustee is not without its own problems. Chief among these is that it requires the Court to assume that Congress intended for § 1406 to assume a scope well beyond that which it possessed before 1984, without any evidence as to such an intent. Nonetheless, a number of considerations weigh in favor of this interpretation.

It is undisputed that § 1406 has long served as the companion to § 1404, governing disposition of improperly venued civil actions. One might expect that given this lineage, the language of the provision would be at odds with its applicability to bankruptcy. However, contrary to § 1404's "civil action" terminology, § 1406's language is more general and applies to "a case laying venue in the wrong division or district." As such, it is fully in accord with the "case" and "district court" language of § 1408 and §1412. Consequently, there is nothing on its face that would preclude the application of §1406 to bankruptcy cases.

A number of bankruptcy courts confronting the applicability of § 1406 to bankruptcy have found guidance in the Supreme Court's decision in Conn. Nat. Bank v. Germain, 503 U.S. 249 (1992). See, e.g., In re Sorrels, 218 B.R. 580, 586-87 (10th Cir. BAP 1998); Swinney v. Turner, 300 B.R. 388, 392 (Bankr. M.D. Ga. 2003). The Court in Conn. Nat. Bank was faced with a problem of statutory construction similar to the one at bar, and concluded that a bankruptcy-specific statute did not operate by negative implication to negate the applicability of a nonbankruptcy-specific statute to the bankruptcy arena. The Court observed that "the statutes do not pose an either-or proposition," since, although the two sections overlap, "each section confers jurisdiction over cases that the other section does not reach." Connnecticut Nat. Bank v. Germain, 503 U.S. at 253. The Court cautioned that "so long as there is no positive repugnancy between two laws, a court must give effect to both." Id. (internal citation omitted).

The Swinney court found the Conn. Nat. Bank holding to be directly pertinent to and dispositive of the question of §1406's applicability to bankruptcy cases.

> [T]here is one bankruptcy specific code section [§ 1412] that is silent [on wrongly venued bankruptcy cases] and one section [§1406], while not bankruptcy specific, that addresses the issue before the Court. Therefore, 28 U.S.C. § 1406 applies to cases that are not addressed in 28 U.S.C. § 1412, namely cases filed in the wrong venue.

300 B.R. at 392. Similarly, in Sorrels, the court found that "[s]ince there is no bankruptcy-specific statute applicable to improperly venued cases, section 1406(a) must apply in bankruptcy, requiring such a case to be dismissed or, if it be in the interest of justice, transferred to a court in which venue is proper." 218 B.R. at 587. This Court finds the reasoning of Swinney and Sorrels to be well-founded. In combination with the foregoing analysis of the proper scope of § 1412, the Court is persuaded that it is not within the bankruptcy court's authority to retain a case improperly venued.

Finally, the Court considers the voice of the Advisory Committee' Notes. The Notes on Rule 1014 for the 1987 Amendment of the Bankruptcy Rules read as follows:

> Both paragraphs 1 and 2 of subdivision (a) are amended to conform to the standard for transfer in 28 U.S.C. Sec. 1412. Formerly, 28 U.S.C. Sec. 1477 authorized a court either to transfer or retain a case which had been commenced in a district where venue was improper. However, 28 U.S.C Sec. 1412, which supersedes 28 U.S. C. Sec. 1477, authorizes only the transfer of a case. The rule is amended to delete the reference to retention of

> *a case commenced in the improper district.* Dismissal of a case commenced in the improper district *as authorized by 28 U.S.C. Sec. 1406* has been added to the rule. If a timely motion to dismiss for improper venue is not filed, the right to object to venue is waived.

(emphasis added). Clearly the Committee viewed § 1406 as governing wrongly venued bankruptcy cases. However, this by itself, proves nothing. Under 28 U.S.C. § 2075, "the rules shall not abridge, enlarge, or modify any substantive right." Thus, if the Court deems Rule 1014 to be beyond the scope of its enabling statute, or if the statutory provision claimed as enabling is deemed inapplicable, then the Rule is not binding on the Court.

However, as the 9th Circuit Bankruptcy Appellate Panel has stated,

> The bankruptcy rules were "studied by committees of experts, then adopted by the Supreme Court, and became effective only after submission to Congress for review." Court rules are entitled to a presumption that they were promulgated within the proper authority of the Supreme Court and do not affect substantive rights. A party contending that a court rule violates substantive rights bears a heavy burden of proof.

In re Neese, 87 B.R. 609, 611 (9th Cir. BAP 1988) (internal citations omitted). While the federal rules of procedure do not carry a legal weight equivalent to federal statutes, they do warrant considerable deference. As described above, the Bankruptcy Rules are prescribed under the auspices of the Supreme Court and are subject to congressional review before they become effective. Thus, Congress effectively ratified the Committee's interpretation of the statute. As the Sorrels court found, "it is hard to imagine why Congress

would not have acted to nullify the Rule [1014] if it believed that it was contrary to its intent when it repealed sections 1475 and 1477 and enacted section 1412." 218 B.R. at 588; see also Washington, Perito & Dubuc, 154 B.R. 853, 858 (Bankr. S.D.N.Y. 1993).

Although the Advisory Committee Notes clearly claim § 1406 as authority for Rule 1014(a)(2), the Rule is not entirely consistent with that statute. Most significantly, §1406 allows for transfer of improperly venued cases "to any district or division in which it could have been brought." Rule 1014(a)(2), in contrast, allows transfer to "any other district." Additionally, the Rule allows transfer in the interest of "justice or for the convenience of the parties," whereas the statute provides transfer only "if it be in the interest of justice." These discrepancies seem to indicate that the drafters of 1014(a)(2), combined elements of § 1412 and § 1406 in crafting this provision entitled *Cases filed in improper district*. Such a construction is contrary to the reading adopted by the Court herein that § 1412 governs properly venued cases, whereas improperly venue cases are governed exclusively by § 1406.

Where there is a conflict between a Rule and its enabling statute, the statute must prevail. See Fed. R. Bankr. P. 9030 ("These rules shall not be construed to extend or limit the . . . venue of any matters therein."). The Court holds, therefore, that transfer of a wrongly venued case or proceeding is permissible only to a forum in which venue would have been proper in the first instance, in accord with the clear language of § 1406.

IV. Conclusion

The question of proper interpretation of the bankruptcy venue statutes is an exceedingly difficult one. There are strong, well-reasoned arguments on both sides of the debate. Clues as to Congress's intent are meager at

best. Upon close examination and applying appropriate rules of statutory construction the Court concludes that 1) 28 U.S.C. § 1408 sets forth mandatory requirements for establishing proper venue; 2) 28 U.S.C §1412 governs the transfer of bankruptcy cases filed in the proper venue; 3) 28 U.S.C. §1406 governs the transfer of cases, including bankruptcy cases, filed in an improper venue; 4) and Fed. R. Bankr. P. 1014(a)(2) should be interpreted to authorize the transfer of cases only to a district in which it could have been properly brought under 28 U.S.C. §1408, in conformity with the Rule's enabling provision, 28 U.S.C. § 1406.

Do the Court's findings reflect the precise intentions of Congress in enacting the 1984 revisions? Is this the "best" outcome? The first question cannot be answered with any certainty, given the meager evidence as to intent available. However, based on a thorough analysis of the statute and its history, the Court is confident that its findings represent the most coherent reading of the statute as a whole in conformity with accepted norms of statutory construction. Answering the second question is simply beyond the scope of the Court's duty and expertise. "If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent.

It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.'" In re Fulbright, 319 B.R. 650, 659 (Bankr. D. Mont. 2005) (quoting United States v. Granderson, 511 U.S. 39, 68 (1994) (Kennedy, J. concurring)).

For the reasons set forth herein, the judgments of the bankruptcy court in In re MacDonald and In re Thompson are hereby **AFFIRMED**, and the judgment of the bankruptcy court in In re Jordan is hereby **REVERSED** and **REMANDED** to the bankruptcy court for further proceedings in conformity with this opinion.

IT IS SO ORDERED this 31st day of October, 2006.

s/Bernice Bouie Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re:
RICKY RODELL RAY,
Appellant. No. 04-2763 BBD

KENNEY DAVID MACDONALD,
Appellant. No. 04-2764 JDB

LEONARD W. JORDAN,
Appellant. No. 04-2766 JDB

GARY LEE MOORE and
KATHY ROBINSON MOORE,
Appellants. No. 04-2762 SHM

REUBEN WALTER THOMPSON and
PATRICIA J. THOMPSON,
Appellants. No. 04-2765 JPM

ORDER GRANTING MOTION TO CONSOLIDATE

Before the Court is United States Trustee's Motion to Consolidate, filed on November 19, 2004. It appearing to the Court for good cause shown that the case of In re Reuben Walter Thompson and Patricial J. Thompson, Case No 04-2765-JPM should be consolidated with the case of In re Rickey Rodell Ray, Case No. 04-2763-BBD.

IT IS, THEREFORE, ORDERED ADJUDGED AND DECREED that this case be and the same hereby are consolidated with Case No. 04-2763-BBD, In re Rickey Rodell Ray.

/s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

Filed: 11/22/2004

Dated: August 25, 2004
The following is ORDERED:

/s/ Jennie D. Latta
Jennie D. Latta
UNITED STATES
BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN RE: **CASE NO. 04-29553-JDL**

REUBEN WALTER THOMPSON, &
PATRICIA J. THOMPSON
DEBTORS. **CHAPTER 13**

ORDER TRANSFERRING CASE TO THE NORTHERN DISTRICT OF MISSISSIPPI

This came on to be heard the 17th day of July, 2004 upon United States Trustee's Motion to Dismiss Case or to Transfer Venue and the Debtors' Response thereto. Upon statements by counsel for the United States Trustee and Holly W. Schumpert, attorney for the Debtors, and having heard testimony, it appears that the Court, relying on its prior decision in In re McDonald, 219 B.R. 804 (Bankr. W.D. Tenn. 1998) finds that venue is not proper in the Western District of Tennessee.

ACCORDINGLY, the Debtors' Chapter 13 case shall be, and is hereby, transferred to the Northern District of Mississippi for further administration.

Approved for entry:

/s/Madalyn Scott Greenwood (#12241)
Assistant U.S. Trustee
200 Jefferson Avenue, Suite 400
Memphis, TN 38103
901-544-3667

/s/ Holly W. Schumpert
100 N. Main Street
Suite 948
Memphis, TN 38103
901-524-1999

/S/ GEORGE W. STEVENSON
George W. Stevenson

PERSONS TO BE SERVED WITH FINAL ORDER:
Debtors
Debtors' Attorney
Chapter 13 Trustee
U.S. Trustee
All parties on the Matrix

*This "Supplemental Memorandum" shall be substituted for the court's original memorandum entered in this case on August 5, 2004.

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
LEONARD W. JORDAN, Debtor.

Case No. 04-28437-K
Chapter 7

SUPPLEMENTAL MEMORANDUM* AND ORDER RE "UNITED STATES TRUSTEE'S MOTION TO DISMISS OR TO TRANSFER [CASE] VENUE" AND DEBTOR'S "RESPONSE TO UNITED STATES TRUSTEE'S MOTION TO DISMISS OR TO TRANSFER VENUE"

This proceeding is before the court on the "United States Trustee's Motion to Dismiss or to Transfer [Case] Venue" and the "Response to United States Trustee's Motion to Dismiss or to Transfer Venue" filed thereto by the above-named debtor, Leonard W. Jordan ("Mr. Jordan"). By virtue of 28 U.S.C. § 157(b)(2)(A), this is a core proceeding. This also is a contested matter governed by FED. R. BANKR. P. 9014. The following shall constitute the court's findings of fact and conclusions of law in accordance with FED. R. BANKR. P. 7052.

The threshold issue presented for judicial determination here is whether the court has the authority, in its sound discretion, to retain a consumer (or business) bankruptcy case filed in a technically improper venue, provided retention is in the interest of justice or for the convenience of creditors and other parties in interest. If the

answer to this question is in the negative, the court must either dismiss the case or transfer it to another district - retention of the case would not be an option. If the answer to this question is in the affirmative, the next question for judicial determination is whether consideration of the totality of the particular facts and circumstances warrant (1) dismissal of Mr. Jordan's chapter 7 case, (2) a change of venue to another district under 28 U.S.C. § 1412, or (3) retention of the case, pursuant to the court's sound discretion under its inherent or implicit authority, for further administration and ultimate formal closing.

Based on practical considerations, Mr. Jordan asserts here that case venue is appropriate in the Western District of Tennessee at Memphis, but even if it is not technically proper as contemplated under 28 U.S.C. § 1408, nonetheless the court under the totality of the existing facts and circumstances and applicable law should retain this case for further administration based on the convenience of his creditors and other parties in interest, including him, or in the interest of justice. The United States trustee for Region 8 (Tennessee and Kentucky)("U.S. trustee") timely moved to dismiss the above-referenced chapter 7 case or to change the venue to another district contending that the only remedies or options available to the court upon a determination of improper case venue are dismissal or transfer of the case to another district, and that, pursuant to FED. R. BANKR. P. 1014(a)(2) and its accompanying Advisory Committee Notes, absolutely no judicial discretion exists to allow for retention of this case by the court. It is noted from the outset that retention by the court of a bankruptcy case under title 11, after it has been determined that case venue is improper, is not specifically authorized by statute; neither, however, is case retention

specifically prohibited by the Bankruptcy Code and the accompanying title 28 bankruptcy venue provisions.[1]

The relevant background facts may be briefly summarized as follows: On June 2, 2004, Mr. Jordan, a financially distressed consumer debtor, filed an original, no-asset chapter 7 petition in the Western District of Tennessee, Western Division, at Memphis. The Judicial District at Memphis under the existing circumstances was the choice of case venue selected by Mr. Jordan and his attorney, Steven F. Bilsky, Esquire for their accommodation and also the accommodation of Mr. Jordan's creditors and other parties in interest. Mr. Jordan resides and currently works in Southaven,[2] Mississippi, a so-called "bedroom community" or "suburb" of Memphis. Southaven is located immediately south of Memphis and is situated in the Northern District of Mississippi; actually, it is located just inside the Mississippi-Tennessee state line. In reality, Southaven, Mississippi, is literally one physical step away from Memphis, Tennessee (or vice-versa).

The Assistant U.S. trustee and Mr. Jordan's attorney entered into the following stipulation of facts ("Stipulation"):

- "The Debtor filed a voluntary petition under chapter 7 on June 2, 2004.
- The Debtor's petition disclosed he resides at 2321 Ashland Drive, Southaven, Mississippi 38671, a city located in the Federal Judicial

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[1] As will be discussed later, a procedural bankruptcy rule purports to prohibit or foreclose the court from exercising its inherent or implicit discretionary authority on a case-by-case basis to retain a technically improperly venued case, even if retention is for the convenience of creditors and other parties in interest or in the interest of justice.

[2] Mr. Jordan's Schedule I reflects that he has worked for two weeks with Manpower of Southaven as a temporary worker.

District for the Northern District of Mississippi.

- The Debtor checked the "venue" box asserting venue in the Western District of Tennessee was proper.[3]
- The Debtor's Schedule A lists the Debtor's ownership of real property located at 2321 Ashland Drive, Southaven, Mississippi 38671.

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[3] It is noted that Official Bankruptcy Forms 1 (Voluntary Petition) and 5 (Involuntary Petition) address, among other things, venue information. Two venue related boxes exist for the debtor(s) or petitioning creditor(s) to check. One box is for proper venue under 28 U.S.C. § 1408(1); and the second box is for proper venue under 28 U.S.C. § 1408(2). No box currently exists to check for a technically improper venue, although it may be for the convenience of the creditors and other parties in interest or in the interest of justice. To avoid possible confusion and uncertainty and to promote statistical clarity and accuracy, should a third box be included in Official Forms 1 and 5 to be checked if the venue that is selected is technically improper, but is actually for the convenience of the parties or in the interest of justice? If so, to address this matter in the near term should debtors in voluntary cases under sections 301 and 302 and petitioning creditors in involuntary cases under section 303 slightly alter Official Forms 1 and 5 by adding a third box as permitted by FED. R. BANKR. P. 9009 in the interest of facilitating the processing of accurate bankruptcy administration or should some other appropriate alteration be accomplished (*e.g.*, use of a separate venue statement)? It is observed that "[t]he use of the Official Forms has generally been held subject to a 'rule of substantial compliance'...." See the Advisory Committee Note accompanying FED. R. BANKR. P. 9009. This suggested slight alteration approach seemingly would be more preferable for numerous reasons rather than the debtor or petitioning creditors checking a perceived appropriate venue box that is determined at a later date to be technically incorrect or just leaving the two existing venue boxes unchecked in the event of improper venue. (It is noted that FED. R. BANKR. P. 1009 continues the permissive approach adopted by former Bankr. Rule 110 to amendments of voluntary petitions (and accompanying papers) as a matter of course at any time before the case is closed.)

- The Debtor's Schedule C claimed exemptions under the statutes of Mississippi.
- The Debtor's Schedule D lists the address of the creditor that holds the mortgage on the Debtor's real property as Louisville, Kentucky.
- The Debtor's Schedule F lists eight national creditors with only one creditor having a Memphis address. The Memphis creditor holds 11.7% of the Debtor's unsecured debt.
- The Debtor's Schedule I lists a Mississippi employer.
- The Debtor answered in the negative to question No. 15 of the Statement of Financial Affairs regarding a prior address within two years immediately proceeding (sic) the commencement of the Debtor's bankruptcy case.
- The Debtor answered in the negative to question No. 18 of the Statement of Financial Affairs to having an interest in a business within six years immediately preceding the commencement of the Debtor's bankruptcy case.
- The Debtor's Schedules do not disclose any tangible assets located in the Western District of Tennessee.
- The United States Trustee filed a timely Motion to Dismiss or Transfer Venue on June 15, 2004.
- On July 2, 2004 the Court issued a Notice of Pre-Trial Conference for July 27, 2004 on the United States Trustee's Motion to Dismiss or Transfer Venue.
- On July 27, 2004, upon agreement of the Debtor and United States Trustee, the United

States Trustee's Motion to Dismiss or Transfer Venue was continued to August 17, 2004.

- Upon written request for the Honorable David S. Kennedy on July 28, 2004, and at a telephonic conference held on July 29, 2004, the hearing on the United States Trustee's Motion to Dismiss or Transfer Venue was advanced to August 3, 2004."

The instant motion of the United States trustee correctly states that it was "timely" filed on June 15, 2004, in an effort to dismiss this case or alternatively to change the venue to another district alleging that "[a] review of the Petition does not support the Debtor's assertion that a venue in this district [the Western District of Tennessee] is appropriate." (Emphasis added). More specifically, the U.S. trustee seeks a dismissal of this case for asserted "lack of venue jurisdiction, pursuant to 28 U.S.C. § 1408 and FED. R. BANKR. P. 1014,"[4] or alternatively a "transfer of the instant case to a District in which venue jurisdiction would exist."[5] It was orally stated at the hearing on the instant

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[4] *Compare* 11 U.S.C. § 707(a) which sets forth a non-exhaustive list of reasons warranting a case dismissal. (Court may dismiss a chapter 7 case "for cause," after notice and a hearing).

[5] 11 U.S.C. § 307 provides as follows:

> The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title.

The supervisory duties of the U.S. trustee are illustrated and set forth in 28 U.S.C. § 586. Assuming for discussion that the statutory role of the U.S. trustee includes filing such case venue motions, rather than possibly filing with the court comments with respect to such motions commenced by creditors and other parties in interest in particular cases, should case dismissal or change of venue motions be filed in every case by the U.S. trustee involving a technically improper venue without regard to the underlying facts and circumstances and consideration of the statutory standards ("for the convenience of the

motion that the United States trustee's alternative relief specifically seeks a transfer of the case venue to the Northern District of Mississippi where Mr. Jordan lives and currently works. Mr. Jordan's Response filed on July 1, 2004, essentially asserts for practical reasons that case venue is appropriate in the Western District of Tennessee at Memphis because of the convenience of the parties or the interest of justice.

Interestingly, no creditor of Mr. Jordan or other party in interest has filed a similar motion seeking a case dismissal or transfer of venue to the Northern District of Mississippi or to any other judicial district; and no creditor or other party in interest has sought to intervene pursuant to FED. R. BANKR. P. 7024 in the U.S. trustee's instant motion seeking to dismiss the case or transfer the venue to another district. Perhaps understandably so as no Mississippi creditor exists in this case. Mr. Jordan's Schedules and the parties' Stipulation list nine nationwide creditors as follows: Kentucky (3); Virginia (2); Delaware (1); Oregon (1); Memphis, Tennessee (1); and California (1). Mr. Jordan's attorney herein is located in Memphis, Tennessee.

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parties" or "in the interest of justice")? Does the U.S. trustee's newly assumed role of "venue police" actually create potential irreconcilable tension between the real motivation and intent of the U.S. trustee in apparently attempting to alter to an extent the caseload of adjoining Judicial Districts and with the title 28 venue standards involving "for the convenience of the parties" or "in the interest of justice" to be considered on a particular case-by-case basis, and also with the judicial goal of FED. R. BANKR. P. 1001 ("to secure the just, speedy, and inexpensive determination of every case and proceeding"). Perhaps in the final analysis, the U.S. trustee's actual motivation for filing such motions is misplaced considering the standards of the convenience of the parties or the interest of justice. See also 28 U.S.C. § 586(a)(3)(G).

Notwithstanding the proper/improper bankruptcy case venue dichotomy, there indeed are compelling practical reasons which support retention of the venue of this case in the Western District of Tennessee at Memphis (*e.g.*, close proximity to a bankruptcy court). An individual could literally straddle the Tennessee/Mississippi State line by having one leg placed in Southaven, Mississippi and the other leg placed in Memphis, Tennessee. Many Southaven residents are employed and have major creditors located in Memphis. The nearest Mississippi bankruptcy court duty station is located in the Northern District of Mississippi at Oxford, which is located approximately 75 miles southeast of Southaven/Memphis, or possibly Aberdeen, Mississippi, which is located approximately 130 miles southeast of Southaven/Memphis. Memphis is much closer and more readily accessible to Mr. Jordan's creditors, if they seek access to a bankruptcy court in this case.[6] Additionally, the U.S. trustee for Region 8, the movant here, is actually located in the same private office building as the Memphis bankruptcy court. The Chapter 7 trustee appointed by the United States trustee for Region 8 in this case also is located in Memphis. Compared to Memphis, the bankruptcy bar in Southaven, Mississippi is quite small. Of course, practicalities, standing alone, are not sufficient reasons to justify this court's retention of this case.

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[6] The U.S. trustee for Region 8 suggested the possibility of the U.S. trustee for Region 5 someday convening meetings of creditors under 11 U.S.C. § 341(a) at Hernando, Mississippi, which is located in close proximity to Southaven/Memphis. Even assuming that this eventually happens, court matters before a bankruptcy judge would still be held in Oxford or Aberdeen, Mississippi. See 28 U.S.C. § 104(a). A § 341(a) meeting of creditors under the Bankruptcy Code is a nonjudicial meeting and is not a trial or an adjudicative hearing. *In re Kincaid*, 146 B.R. 387 (Bankr. W.D. Tenn. 1992). (By virtue of 11 U.S.C. § 341(c), no judicial officer attends or presides at the meeting of creditors.)

It was repeatedly said under the former Bankruptcy Act of 1898 and also under the Bankruptcy Reform Act of 1978 that venue of bankruptcy cases (but not specific civil action lawsuits or other proceedings) has become increasingly unimportant over the years (discussed more fully hereinafter). Of recent times, case venue in this Judicial District has become somewhat of a controversial subject matter due to the current role unexpectedly assumed by the United States trustee for Region 8 to evidently file a motion to dismiss or transfer the venue in all cases filed in the Western District of Tennessee at Memphis when case venue under 28 U.S.C. § 1408 is technically improper (even though retention of the case actually may be in the interest of justice or for the convenience of the debtor's creditors and other parties in interest in a particular case). The underlying case venue focus in most bankruptcy courts traditionally and ordinarily is on what is "for the convenience of the parties" or "in the interest of justice" in order to, inter alia, "secure the just, speedy, and inexpensive determination of every case and proceeding" in accordance with the judicial goal set forth in FED. R. BANKR. P. 1001.

Generally, utilization and implementation of prohibitive or restrictive per se rules, as suggested by the U.S. trustee here, are not favored in an equity court. However, due to, for example, the permissive filing provisions under 28 U.S.C. § 1408(1)-(2), the filing requirements of FED. R. BANKR. P. 5005, and the expanded subject matter jurisdiction of the court under the Bankruptcy Reform Act of 1978 and its nationwide service of process pursuant to FED. R. BANKR. P. 7004, the bankruptcy system, of course, would be inequitably incomplete without some basic substantive fairness provisions and implementing procedural rules to be triggered and applied on a case-by-case basis for appropriate protection of non-debtor parties in interest

from abusive or unfairly manipulative debtors in voluntary bankruptcy cases or petitioning creditor(s) in involuntary bankruptcy cases who engage in inappropriate forum-shopping, forcing non-debtor parties in interest to travel to trial or hearings at remote, inconvenient, or costly bankruptcy court locations. Quite naturally, close and careful judicial scrutiny is required in these matters. Not surprisingly, case or proceeding venue abuse and inequitable manipulation by debtors in voluntary cases and petitioning creditors in involuntary cases should be strongly discouraged. See, for example, 28 U.S.C. § 1412, FED. R. BANKR. P. 1014(a), FED. R. BANKR. P. 7087, and 11 U.S.C. § 105(a) for illustrations of protective statutory and procedural safeguards.

As will be seen later, it appears here that the zeal of the U.S. trustee in filing and prosecuting this motion, if eventually successful, could, inter alia, unfortunately defeat or summarily thwart the judicial goal contained in FED. R. BANKR. P. 1001 ("to secure the just, speedy, and inexpensive determination of every case and proceeding") and as a by-product unintentionally accomplish undesired results or possible unintended consequences concerning, for example, Mr. Jordan's real creditors. That is, if the U.S. trustee's instant motion without recorded support from any creditor or other party in interest is granted, it could ironically force Mr. Jordan's creditors and other parties in interest including Mr. Jordan and his attorney of choice to an inconvenient and costly bankruptcy court location at the urging of the U.S. trustee, if Rule 7001 adversary proceedings and/or Rule 9014 contested matters are filed with the bankruptcy court. It appears that the initial motivation of the U.S. trustee in filing such dismissal or transfer motions in all cases in this District involving technically improper case venue without regard to the standards of "for the convenience of the parties" or "in the interest of justice" in particular cases was the result of a

broad effort or project to increase the statistical caseload of a particular private panel Chapter 13 trustee located in Region 5 of the U.S. trustee program who is located in the Northern District of Mississippi[7], and at the same time diminish, in part, the caseload of the private panel trustees in the Western District of Tennessee at Memphis – seemingly without regard to the immediate costs to debtors and their creditors in particular cases (especially in chapter 13 cases). (See the "tension discussion" referred to in footnote 5 above.)

A preliminary question that must be addressed by a debtor in contemplation of filing a voluntary bankruptcy case under section 301 or 302, or the petitioning creditor(s) in an involuntary case under section 303, after deciding to seek relief under the Bankruptcy Code, is where should the voluntary or involuntary "petition" be filed and processed.[8] Under the existing jurisdictional scheme, the United States district courts have original and exclusive jurisdiction to administer all bankruptcy cases.[9] After the reference by the United States district courts to the bankruptcy courts under 28 U.S.C. §157(a), in which judicial bankruptcy district should the title 11 "case" be filed? This is, of course, a bankruptcy "case" venue question. The technically proper

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[7] See 28 U.S.C. § 581(a)(5) (the judicial districts established for the States of Louisiana and Mississippi).

[8] "Petition" is defined in § 101(42) as follows:

> "'Petition' means petition filed under section 301, 302, 303, or 304 of the title, as the case may be, commencing a case under this title."

(Emphasis added).

[9] Art 1, § 8, Cl. 4 of the U.S. Constitution; 28 U.S.C. §§ 1334(a) and 157(a). (The United States district court is initially vested with exclusive jurisdiction over bankruptcy "cases" and thereafter may refer such cases to the bankruptcy court.)

venue for a bankruptcy "case" is dealt with by 28 U.S.C. § 1408, infra.

To determine whether case venue is technically proper or improper under the laws of Congress relating to bankruptcy requires, among other things, distinguishing between bankruptcy "cases" on the one hand and bankruptcy "civil proceedings" on the other. Although not statutorily defined, the term "case" as used in the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure is a term of art and broadly embraces every event from the initial filing of the petition under section 301, 302, 303, or 304 through and until its formal closing under section 350(a) after the bankruptcy estate is fully administered. Particular disputes or other specific events that arise within and during the pendency of a "case" generally are referred to as core or non-core civil "proceedings." Numerous "proceedings" may occur within a given bankruptcy "case."[10] To ask what is a proper venue of the "case" filed under the Bankruptcy Code is to ask the question in which bankruptcy court should the "petition" be filed (being mindful of the convenience of the parties or interest of justice standards). Once the bankruptcy "case" has been filed, most, but not all, of the "proceedings" filed within the case (*i.e.*, specific civil actions or lawsuits) will

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[10] See *In re Pioneer Inv. Services Co.*, 946 F.2d 445 (6th Cir. 1991), citing King, 38 VAND. L. REV. at 676-77 (footnote omitted). A "proceeding" in the bankruptcy court is akin to a civil action lawsuit in the United States district court or State court. A "case" under title 11 is unique to the bankruptcy court; there is nothing comparable to it in the United States district court or State court. On the other hand, bankruptcy "adversary proceedings" are quite comparable to civil actions in the United States district court or State court. See FED. R. BANKR. P. 7001(1)-(10); see also FED. R. BANKR. P. 9014 involving "contested matters."

have the same venue subject to specific transfer of such proceedings. See 28 U.S.C. § 1409 (for proceeding venue); compare FED. R. BANKR. P. 7087 (for transfer of "proceeding" venue).

A "case" under the Bankruptcy Code may have proper venue in numerous different judicial districts. For example, it is conceivable that an individual debtor could have a current domicile in Tennessee, be residing in Mississippi, operating a sole proprietorship whose principal place of business is in Arkansas, whose principal assets consists of a shopping center located in Alabama, and whose future domicile is Missouri where the individual is from and intends to eventually return.

The following background information involving the prior superseded jurisdictional and venue legislation and related implemental procedures accompanying the Bankruptcy Reform Act of 1978 may be of some historical interest and assistance. The originally enacted title 28 jurisdictional and venue provisions that accompanied title 11 cases under the Bankruptcy Reform Act of 1978 are referred to below and are now superseded due to the 1984 jurisdictional restructuring by Congress. The superseded bankruptcy jurisdictional provisions in 1978 were found in 28 U.S.C. § 1471(a), (b), and (c) and provided:

> **28 U.S.C. § 1471. Jurisdiction**
>
> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings

arising under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

The relevant venue statutes, as originally enacted and accompanying the 1978 Bankruptcy Code, also superseded in 1984, provided as follows:

Superseded 28 U.S.C. § 1472, entitled *Venue of cases under title 11*, provided as follows:

"Except as provided in section 1474 of this title, a case under title 11 may be commenced in the bankruptcy court for a district –

(1) in which the domicile, residence, principal place of business, in the United States, or principal assets, in the United States, of the person or entity that is the subject of such case have been located for the 180 days immediately preceding such commencement, or for a longer portion of such 180-day period than the domicile, residence, principal place of business, in the United States or principle assets, in the United States, of such person were located in any other district;(emphasis added);

(2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.

Superseded 28 U.S.C. § 1475 was entitled *Change of Venue* and stated:

A bankruptcy court may transfer a case under title 11 or a proceeding arising under or related to such a case to a bankruptcy court for another district, in the interest of justice and for the convenience of the parties. (emphasis added).

Superseded 28 U.S.C. § 1477 was entitled *Cure or waiver of defects* and provided:

(a) The bankruptcy court of a district in which is filed a case or proceeding laying venue in the wrong division or district may, in the interest of justice and for the convenience of the parties, retain such case or proceedings, or may transfer, under section 1475 of this title, such case or proceeding to any other district or division. (emphasis added).

(b) Nothing in this chapter shall impair the jurisdiction of a bankruptcy court of any matter involving a party who does

not interpose timely and sufficient objection to the venue.

Former Bankr. Rule 116 was the procedural vehicle that implemented these superseded title 28 venue statutes as well as the title 28 transfer provisions and provided in its entirety as follows:

(a) Proper Venue.

(1) *Natural Person.* A petition by or against a natural person may be filed in the district where the bankrupt has had his principal place of business, residence, or domicile for the preceding 6 months or for a longer portion thereof than in any other district. A petition by or against a natural person who has had no principal place of business, residence, or domicile within the United States during the preceding 6 months may be filed in a district wherein he has property.

(2) *Corporation or Partnership.* A petition by or against a corporation or partnership may be filed in the district (A) where the bankrupt has had its principal place of business or its principal assets for the preceding 6 months or for a longer portion thereof than in any other district; or (B) if there is no such district, in any district where the bankrupt has property.

(3) *Partner with Partnership or Copartner.* Notwithstanding the foregoing:

(A) a petition commencing a bankruptcy case may be filed by or against any general partner in a district where a petition under the Act by or against a partnership is pending;

(B) a petition commencing a bankruptcy case may be filed by or against a partnership or by or against any other general partner or by or against any combination of the partnership and the general partners in a district where a petition under the Act by or against a general partner is pending.

(4) *Affiliate.* Notwithstanding the foregoing, a petition commencing a bankruptcy case may be filed by or against an affiliate of the bankrupt in a district where a petition under the Act by or against the bankrupt is pending.

(b) *Transfer of Cases; Dismissal or Retention When Venue Improper.*

(1) *When Venue Proper.* Although a petition is filed in accordance with subdivision (a) of this rule, the court may after hearing on notice to the petitioner or petitioners or such other person as it may direct, in the interest of justice and for the convenience of the

parties, transfer the case to any other district. The transfer may be ordered at or before the first meeting of creditors either on the court's own initiative or on motion of a party in interest but thereafter only on a timely motion.

(2) *When Venue Improper.* If a petition is filed in a wrong district, the court may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, dismiss the case or, in the interest of justice and for the convenience of the parties, retain the case or transfer it to any other district. Such an order may be made at or before the first meeting of creditors either on the court's own initiative or on motion of a party in interest but thereafter only on a timely motion. Notwithstanding the fore- going, the court may without a hearing retain a case filed in a wrong district if no objection is raised.

As originally enacted under the Bankruptcy Reform Act of 1978, the bankruptcy court had pervasive jurisdiction; it was essentially, as many have said, a de facto independent trial court. In *Northern Pipeline Const. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), judgment stayed, 459 U.S. 813, the Supreme Court, in a plurality opinion, held that Congress by passing 28 U.S.C. § 1471(c) impermissibly delegated Article III judicial powers to a non-Article III court (*i.e.*, too much power and not enough protection were afforded the nation's bankruptcy judges).

The Supreme Court declared 28 U.S.C. § 1471(c) unconstitutional. It is important to note that the Supreme Court's *Marathon* decision only declared 28 U.S.C. § 1471(c) unconstitutional (*i.e.*, the statutory subsection provision that automatically referred all bankruptcy cases and proceedings to the bankruptcy court to exercise original jurisdiction without any withdrawal of the reference procedures). The Bankruptcy Code in title 11 containing the substantive bankruptcy laws, 28 U.S.C. § 1471(a)-(b) regarding jurisdiction of bankruptcy cases and proceedings, and the related title 28 bankruptcy case and proceeding venue statutes were not dealt with by the *Marathon* decision.

It is very important to emphasize that the *Marathon* jurisdictional opinion did not deal with the related title 28 case and proceeding venue provisions which were not the subject or focus of the Supreme Court's decision. After two years of jurisdictional chaos (but not venue chaos), Congress attempted to solve the jurisdictional/constitutional problem by granting original and exclusive jurisdiction of all bankruptcy cases and concurrent jurisdiction of all civil bankruptcy proceedings to the Article III district court under 28 U.S.C. § 1334(a)-(b), and then authorizing the jurisdiction of such cases and proceedings to be delegated to the bankruptcy court to exercise original bankruptcy jurisdiction under the permissive reference provisions under 28 U.S.C. § 157(a), subject to the permissive and/or mandatory withdrawal of the reference provisions under 28 U.S.C. § 157(d). In accordance with the 1984 jurisdictional restructuring and resulting related amendments, the bankruptcy courts were reconstituted as statutory units or adjuncts of the United States district courts; and each bankruptcy judge, as a judicial officer of the district court, may exercise the judicial authority conferred under title 28 with respect to

bankruptcy cases and civil proceedings. 28 U.S.C. §§ 151, 152, 1334(a)-(b), and 157.

The basic grant of jurisdiction in bankruptcy cases and proceedings under the 1984 restructuring by Congress currently is found in 28 U.S.C. § 1334. The principal subdivisions, (a) and (b) of section 1334, provide in their entireties as follows:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

The proper technical venue for the commencement of a case under the Bankruptcy Code created under the 1984 restructuring by Congress is now set forth in 28 U.S.C. § 1408, enacted as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984 and entitled *Venue of cases under title 11.*[11] Section 1408 of title 28 supercedes prior 28

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[11] Pub. L. No. 98-353. Although section 1408(a) of title 28 superseded prior 28 U.S.C. § 1472(a), it is substantially similar except for some minor changes in the statutory wording and also, of course, the substitution of "district court" for "bankruptcy court" due to *Marathon*. Sparse legislative history exists under the 1984 bankruptcy amendments.

U.S.C. § 1472. Specifically, 28 U.S.C. § 1408 permissibly (not mandatorily) provides in its entirety as follows:

> "Except as provided in section 1410 of this title, a case under title 11 may be commenced in the district court for the district –
>
> > (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person where located in any other district (emphasis added); or
> >
> > (2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.

It also is emphasized that the permissive filing provisions of 28 U.S.C. § 1408, dealing with technically proper venue of cases under title 11, is not jurisdictional in nature. Thus, improper bankruptcy "case" venue, unlike subject matter jurisdiction, can be waived. Compare Rule 12(b)(3) of the Federal Rules of Civil Procedure.

Due to the *Marathon* decision, 28 U.S.C. § 1408 statutorily specifies that bankruptcy case venue is properly

in the United States district court rather than the bankruptcy court. Of course, this is consistent with the 1984 jurisdictional amendments, which placed jurisdiction and venue of bankruptcy cases and proceedings initially in the district court, and thereafter discretionally permitted the reference of cases and proceedings by the United States district court to the bankruptcy court, subject to the withdrawal provisions of 28 U.S.C. § 157(d). See 28 U.S.C. §§ 1334 and 157; FED. R. BANKR. P. 9002(4).[12] The case and proceeding venue provisions enacted as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984 are discussed below.

Newly created 28 U.S.C. § 1409 addresses venue of "proceedings" arising under title 11 or arising in or related to cases under title 11 and provides as follows:

> (a) Except as otherwise provided in subsections (b) and (d), a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending.
>
> (b) Except as provided in subsection (d) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case to recover a money judgment of or property worth less than $1,000 or a consumer debt of less than $5,000 only in the district court for the district in which the defendant resides.

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[12] FED. R. BANKR. P. 9002(4) provides, *e.g.*, that "district court" or "district judge" means bankruptcy judge if the case or proceeding is pending before a bankruptcy judge.

(c) Except as provided in subsection (b) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case as statutory successor to the debtor or creditors under section 541 or 544(b) of title 11 in the district court for the district where the State or Federal court sits in which, under applicable nonbankruptcy venue provisions, the debtor or creditors, as the case may be, may have commenced an action on which such proceeding is based if the case under title 11 had not been commenced.

(d) A trustee may commence a proceeding arising under title 11 or arising in or related to a case under title 11 based on a claim arising after the commencement of such case from the operation of the business of the debtor only in the district court for the district where a State or Federal court sits in which, under applicable nonbankruptcy venue provisions, an action on such claim may have been brought.

(e) A proceeding arising under title 11 or arising in or related to a case under title 11, based on a claim arising after the commencement of such case from the operation of the business of the debtor, may be commenced against the representative of the estate in such case in the district court for the district where the State or Federal court sits in which the party commencing such proceeding may, under applicable nonbankruptcy venue provisions, have

> brought an action on such claim, or in the district court in which such case is pending.

FED. R. BANKR. P. 7087 along with 28 U.S.C. § 1412, infra, address change of venue of "proceedings."

Newly created 28 U.S.C. § 1412 enacted in 1984, entitled *Change of venue*, supersedes prior 28 U.S.C. §1475 (*Change of venue*) and allows for a transfer of a case whether venue is proper or improper for the convenience of the parties or in the interest of justice. It states in its entirety as follows:

> A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties. (emphasis added).[13]

What happened under the 1984 restructuring to prior 28 U.S.C. § 1477 and its cure or waiver of defects provisions that authorized the bankruptcy court to cure or waive defects by, for example, retaining a technically improperly venued case after applying the standards "in the interest of justice and for the convenience of the parties in particular cases?" This is a logical and obvious question. Many believe that due to Congress' rush at the last moment to resolve and finalize the *Marathon* constitutional/jurisdictional problem, a similar "cure or waiver of defects" statute was inadvertently omitted as a

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[13] Although 28 U.S.C. § 1412 superseded prior 28 U.S.C. § 1475, it is substantially similar except for some minor changes in the statutory wording and also, of course, the substitution of "district court" for "bankruptcy court" due to *Marathon*.

drafting error or omission. This apparent legislative error or omission has created a bankruptcy case venue gap under the 1984 restructuring provisions.[14] Rule 1014(a)(2) of the Federal Rules of Bankruptcy Procedure, infra, evidently purports to fill this bankruptcy venue gap or erroneous bankruptcy venue omission via procedural legislation. (This matter will be further discussed hereinafter.)

Unlike civil action lawsuits in the United States district court under 28 U.S.C. §§ 1404 (*Change of Venue*) and 1406 (*Cure or waiver of defects)*, case venue under 28 U.S.C. § 1412 (*Change of venue*) may be transferred by the district court (*i.e.*, the bankruptcy court by virtue of 28 U.S.C. § 157(a)) to "another district" whether the district in which it could have been brought a proper venue or to an otherwise improper venue "in the interest of justice" or "for the convenience of the parties." The provisions of 28 U.S.C. §§ 1404 and 1406 involving venue of civil actions that are applicable in the United States district court do not apply to bankruptcy "cases" under title 11 (*i.e.*, the statutory provisions of §§ 1404 and 1406 do not apply to "cases" or "proceedings" under the Bankruptcy Code). For example, there is no mandatory requirement in 28 U.S.C. § 1412 (*Change of venue*) that the court transfer a properly or improperly venued case "for the convenience of the parties" or "in the interest of justice" to a district in which the "case" could have been brought, as there is in 28 U.S.C. §§ 1404

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[14] See also *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Company, Etc.*, 529 U.S. 193, 203 (2000), *citing Brunette Machine Works, Ltd. v. Kockum Industries, Inc.*, 406 U.S. 706, 710, n. 8 (1972) ("there have been, and perhaps there still are, occasional gaps in the venue laws, [but] Congress does not in general intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other. Thus, in construing venue statutes it is reasonable to prefer the construction that avoids leaving such a gap.")

and 1406 involving specific civil action lawsuits in the district court. Venue considerations in bankruptcy cases are decidedly quite different from venue issues involving specific civil action litigation in the United States district court.[15] The major distinctions between these sections lead one to conclude, therefore, that precedents under 28 U.S.C. §§ 1404 and 1406 involving change of venue of civil actions in the district court are not in their entireties relevant in interpreting the bankruptcy change of venue provisions of 28 U.S.C. § 1412 and related bankruptcy venue matters). 1 *Collier on Bankruptcy* ¶ 4.05[1], p. 4-38 (15th ed).

More specifically, in *In re Lazaro*, 128 B.R. 168, 172-174 (Bankr. W.D. Texas 1991), the court comprehensively set forth its distinctive reasoning on these important issues and stated as follows:

> With the 1984 BAFJA amendments a "change of venue" provision was preserved for Title 11 cases, while a "cure or waiver of defects" provision for such cases was deleted.
>
> By this did Congress intend for Section 1406 to now govern all federal cases *including* bankruptcy cases, or did Congress intend to have the "change of venue" section control all venue matters, regardless whether venue was proper or improper?

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[15] See other title 28 statutory provisions where the comparably bankruptcy related statutes are broader in scope than in the United States district court. *See, e.g.*, 28 U.S.C. § 1441 and 28 U.S.C. § 1452(a) regarding removal of civil litigation from a State court to the United States district court or bankruptcy court. Pursuant to 28 U.S.C. § 1441(a) only a defendant may remove a civil action to the United States district court. By virtue of 28 U.S.C. § 1452(a), any party may remove any claim or cause of action in a civil action to the bankruptcy court (with limited exceptions).

Section 1406(a) was itself revised in 1960 to *add* the language permitting transfer of a case where original venue was improper, to ameliorate the harsh result under prior law which dictated that a case *had* to be *dismissed* if venue was improper. *Goldlawr, Inc. v. Heiman,* 369 U.S. 463, 82 S.Ct. 913, 8 L.Ed.2d 39 (1962); *Concession Consultants, Inc. v. Mirisch,* 355 F.2d 369 (2d Cir.1966). The trend in the law is thus *away* from a harsh, rigid rule and toward a more practical, flexible alternative. The advisory committee's note to current Bankruptcy Rule 1014(a), by contrast, seems to back peddle toward rigidity and inflexibility, concluding as it does that Section 1406 *must* apply to bankruptcy cases, when the deletion of Section 1477 by the BAFJA amendments could just as easily be interpreted as the logical next step in Congress' continuing retreat from rigid rules relating to venue in federal cases.

There is another reason why the drafters of Bankruptcy Rule 1014 appear to have been mistaken in presuming that Section 1406(a) must control in bankruptcy cases (as they did in their drafting of Bankruptcy Rule 1014(a)(2)). The statute which the advisory committee note maintains was the predecessor to Section 1412 (Section 1477) authorized retention or transfer, but also permitted transfer to another district without regard to whether that district *itself* was a proper venue for the case. Section 1406(a), by contrast, permits transfer only to districts which are otherwise proper venues. Section 1412 is more

in line with both prior Sections 1477 and 1475 than it is with Section 1406(a), in that it permits transfer to other districts, without regard to whether those districts are themselves proper venues.

The *Boeckman* court [*In re Boeckman*, 54 B.R. 110 (Bankr. D. S.D. 1985)] concluded that Congress did not intend to eliminate the option of retaining an improperly filed case by deleting the retention language formerly included in Section 1477. *In re Boeckman*, 54 B.R. at 111. "[T]he permissive language used in Section 1412 ... merely says that a district court 'may' transfer a case to another district; it does not say it must transfer the case, nor does it say that if the court determines not to transfer the case, that it must dismiss the case." *Id.* "[T]he wording of the statute indicates that the basis for the transfer should be 'in the interest of justice or for the convenience of the parties.' It seems logical that if a transfer is not in the interest of justice or for the convenience of the parties, the court may also decide not to transfer the case." *Id.*

It is an odd construction indeed to maintain that New Mexico would be free to transfer this case to the Western District of Texas (as the statute clearly authorizes), but that the Western District of Texas is not free to retain the selfsame case. In fact, even Bankruptcy Rule 1014 permits transfer "to any other district" without limitation, if transfer is in

the interest of justice or for the convenience of the parties. FED. R. BANKR. P. 1014(a)(2). At the very least, this relative flexibility in both the statute and the rule regarding transfer of cases "to any other district" is entirely inconsistent with the intractable notion that the same court, if it decides *not* to transfer to a district whose venue would be improper, must dismiss rather than keep it in an improper venue. *See In re Boeckman,* 54 B.R. at 111.

It seems especially significant that Congress deleted Section 1477, the bankruptcy counterpart to Section 1406, and preserved only the much more flexible change of venue provisions originally found in Section 1475 and now found in Section 1412. The court in *In re Leonard* persuasively argued:

> There is no legislative history which suggests in any way an intent to make a substantive change in the law. Section 1412 permits a transfer to *any* other district. It would make no sense to permit a transfer to any other district, i.e., one in which venue might be improper, and not permit retention in an improper venue. It would be anomalous to conclude that a debtor is prohibited from staring (sic) out in an improper venue when the case could be transferred to an improper venue. I hold, therefore, that if Congress did intend to repeal both § 1475, relating to transfer to *any* other district, and also §

1477, relating to retention in an improper forum, and substitute therefor the new § 1412, the most probable intention of Congress was to streamline the language and not to make a substantive change. Congress may have believed that the power to retain an improperly venued case is implied, without the need for explicit authorization, so long as the district court venue chapter of title 28 contains no provision at all for the dismissal of bankruptcy cases brought in an improper venue, and so long as the transfer of venue provision of that chapter is couched in permissive rather than mandatory language.... Other possibilities exist, of course. Congress may have intended that the new § 1412, granting *district* courts the power to transfer cases, would simply leave unaffected both § 1475 and § 1477, which granted *bankruptcy* courts the power to either retain or transfer cases. If Congress' intent is unclear, then under the general rule of statutory construction as to mutually exclusive statutes passed on, and effective on, the same date, § 1477 would remain unaffected by either provision. *See* 1A Sutherland, *Statutory Construction,* § 23.17 (4th ed. 1972). Therefore, I conclude that this Court continues to have authority to retain this case, even though venue is improper, "in the

interest of justice and for the convenience of the parties."

In re Leonard, 55 B.R. 106, 109-10 (1985); *see also Baltimore Food Systems, Inc.,* 71 B.R. 795, 804 (Bankr.D.S.C.1986); *accord, In re Boeckman,* 54 B.R. at 111.

Congress seems to have recognized that venue considerations in bankruptcy cases are decidedly different from venue issues in general civil litigation (else why enact special venue provisions for bankruptcy cases at all?), and that the hallmark for venue issues in Title 11 cases should be maximum flexibility, leaving to the courts the ability to move or not move bankruptcy cases ("[t]he district court *may* transfer ..."), depending, in the words of the statute, on "the interest of justice and the convenience of the parties." 28 U.S.C. § 1412. Certainly this emphasis on broader, equitable considerations in bankruptcy cases is reflected in other procedural statutes as well. For example, removal in federal civil litigation is closely circumscribed, but removal in bankruptcy cases is broad, automatic, and governed by principles of equity. *Compare* 28 U.S.C. § 1441 *with* 28 U.S.C. § 1452

Interestingly, the language of Section 1412 itself all but mandates that retention be a legitimate alternative regardless whether venue is proper or not. The only statute directly relating to "change of venue" in bankruptcy cases found in Title 28 facially

applies to *any* request for a change of venue, regardless of the reason and regardless of who asks for the change. Therefore, even requests for change of venue made by creditors who maintain that change is appropriate because venue was improper are nonetheless governed by Section 1412. Section 1412 itself then directs courts considering *transfer* to first consider the interest of justice and the convenience of the parties. Presumably, if the interest of justice and the convenience of the parties do not warrant transferring the case, then, under the statute, the court would be abusing its discretion if it *did* transfer the case, regardless whether venue is improper in the first instance. Thus, retention must be the logical consequence of a court's declining to transfer venue.

Nor does this interpretation invite abuse by debtors, though even if it did, it remains for Congress to fix the problem. It would seem that courts evaluating "the interest of justice" are well-advised to consider whether the debtor has been engaging in forum-shopping, and to transfer the case if that is what they conclude is going on. Section 1412 gives the court ample authority therefore to discourage abuse. By the same token, the flexibility built into Section 1412 prevents bankruptcy's equitable proceedings from being held hostage to inequitable procedural rules only marginally related to the realities of the bankruptcy process. Thus, in parts of the country such as far west Texas and southern

> New Mexico, parties already financially trapped need not be deprived of relief by virtue of an intractable and unreasonable bankruptcy venue rule which in operation permits only those who can afford to travel the right to bankruptcy relief. This is especially important to consumer debtors, who often find it difficult enough to even come up with the filing fee, much less travel hundreds of miles (no doubt having to take one or even two days off work, with no assurance that the job will be there for them when they get back from the hearing).

Rule 1014(a) of the Federal Rules of Bankruptcy Procedure, derived from former Bankr. Rule 116, was amended in 1987. It now purports to implement 28 U.S.C. § 1412 regarding change of "case" venue to another district – whether the transferee court is a proper venue or not. Specifically, Rule 1014(a) currently provides in its entirety as follows:

> (1) **Cases Filed in Proper District**. If a petition is filed in a proper district, on timely motion of a party in interest, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the case may be transferred to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties.
>
> (2) **Cases Filed in Improper District**. If a petition is filed in an improper district, on

> timely motion of a party in interest and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the case may be dismissed or transferred to any other district if the court determines that transfer is in the interest of justice or for the convenience of the parties.

As will be discussed more fully below, Rule 1014(a)(2) and its accompanying Advisory Committee Note actually go far beyond the scope of the enabling statue, 28 U.S.C. § 1412 (*Change of venue*), and additionally address (1) case dismissal and (2) retention issues.

Both paragraphs 1 and 2 of subdivision (a) of FED. R. BANKR. P. 1014 were amended in 1987 to attempt to conform to the standard for the transfer of case venue in 28 U.S.C. § 1412 that was newly created in 1984. As noted earlier, superseded 28 U.S.C. § 1477 that contained cure or waiver of defects provisions authorized a bankruptcy court either to transfer or retain a case which had been commenced in a district where venue was technically improper for the convenience of the parties or in the interest of justice. It is again emphasized here that current 28 U.S.C. § 1412 authorizes only the transfer of a case (or proceeding); the statute is completely silent regarding case dismissal and retention issues involving the curing or waiving of defects "for the convenience of the parties" or "in the interest of justice." Importantly, as stated earlier, a transfer of a case under current 28 U.S.C. § 1412 may be to an otherwise improper district unlike the United States district court provisions in 28 U.S.C. §§ 1404 and 1406(a). Amended Rule 1014(a)(2), discussed above, deleted the reference to retention of a case filed in the technically improper district. Dismissal of a case commenced in the

improper district was added to the procedural rule after the 1984 restructuring pursuant to the Rules Enabling Act, 28 U.S.C. §§ 2071-2077; however, Congress has not amended 28 U.S.C. § 1412 or related statutes to allow for a case dismissal or to prohibit the court's retention of case venue under appropriate circumstances. Compare sections 707(a), 1112(b), and 1307(b) of the Bankruptcy Code that provide that "for cause" shown cases may be dismissed.[16] Compare FED. R. CIV. P. 12(b)(3).

Rule 1014 of the Federal Rules of Bankruptcy Procedure provides that if a "timely" motion to dismiss or transfer the "case" is not filed, the right to object to venue is waived, and the court may retain jurisdiction. The term "timely" is not statutorily defined and is a fact question to be addressed and decided on a case-by-case basis. (FED. R. BANKR. P. 7087 is the rule that implements the transfer of a "proceeding" to another district.) Mandatory case dismissal or transfer of a case under the Bankruptcy Code solely for the reason that venue is technically improper can be unduly harsh in a given case and occasionally constitute a punitive remedy or one that inequitably and inappropriately compromises and frustrates, among other things, the judicial goal set forth in FED. R. BANKR. P. 1001 ("to secure the just, speedy, and inexpensive determination of every case and proceeding"). *See, for example, In re Hall, Bayoutree Associates, Ltd.*, 939 F.2d 803, 806b (9th Cir. 1991).

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[16] These title 11 subsections provide a non-exhaustive list of statutory illustrations warranting a case dismissal. Specifically, these subsections each provide "for cause, including" and then they set forth the illustrations. By virtue of 11 U.S.C. § 102(3) " 'includes' and 'including' are not limiting." Improper case venue may constitute cause warranting a case dismissal.

In summary, FED. R. BANKR. P. 1014(a)(2), a procedural rule, essentially purports to modify or enlarge the statutory provisions of 28 U.S.C. § 1412 and attempts to authorize the court to not only transfer a case to another district but also, via procedural legislation, to additionally dismiss the case if a motion contesting venue is timely filed raising the technically improper venue issue. This procedural rule and its accompanying Advisory Committee Note also intend to limit, foreclose, or prohibit the option of the court to exercise its inherent or implicit authority, absent a prohibitive statute, and retain a technically improperly venued bankruptcy case, even if retention of the case is "for the convenience of the parties" or "in the interest of justice."[17] It is emphasized at the point that this rule's per se prohibition of retention on a case-by-case basis of an appropriate but technically improperly venued case seemingly flies in the face of the judicial goal sought to be achieved by FED. R. BANKR. P. 1001 that seeks to "secure the just, speedy, and inexpensive determination of every case and proceeding." It also is noted that FED. R. BANKR. P. 9030, mirroring Rule 82 of the Federal Rules of Civil Procedure, states that the Federal Rules of Bankruptcy Procedure shall not be construed to "extend or limit" the jurisdiction of the courts or the venue of any matters therein. As stated, Rule 1014(a)(2) purports to expand the scope of 28 U.S.C. § 1412 and also limit the court's inherent or implicit authority. See 28 U.S.C. § 2075;[18] *see also* FED. R. BANKR. P. 9030.

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[17] A transfer in the interest of justice may include a consideration of the impact on the convenience of the parties as well as the broader concerns of equity and the administration of the bankruptcy system. *In re Capitol Hotel Group, Inc.*, 206 B.R. 190 (Bankr. E.D. Mo. 1997).

[18] Specifically, 28 U.S.C. § 2075 provides in relevant part as follows:

> The Supreme Court shall have the power to prescribe by general rules, the forms or process, writs, pleadings,

As noted above, the threshold issue presented here is whether the bankruptcy court (or the district court when exercising original bankruptcy jurisdiction) can, in its sound discretion, retain a technically improperly venued case upon the filing of a timely contested venue motion, notwithstanding contrary and prohibitive language found in a bankruptcy procedural rule (*i.e.*, Rule 1014(a)(2) and its accompanying Advisory Committee Note), if retention of the case actually is "for convenience of the parties" or "in the interest of justice."

The court finds in Mr. Jordan's case, considering a totality of the particular facts and circumstances and applicable law, that case venue in the Western District of Tennessee at Memphis is technically improper as contemplated under 28 U.S.C. § 1408(1)-(2). That is, the Western District of Tennessee is not a technically proper case venue as contemplated under the permissive statutory provisions set forth in 28 U.S.C. § 1408; the technically proper case venue here under 28 U.S.C. § 1408(a)(1) is in the Northern District of Mississippi where Mr. Jordan resides. Notwithstanding the proper/improper case venue distinction, Mr. Jordan, of course, can file this case in the Western District of Tennessee, subject to, for example, a change of venue to another district or a case dismissal, after notice and a hearing. Standing alone, there is nothing inherently sinister, vexatious, or contrary to accepted good faith principles about filing a bankruptcy case in a technically improper venue. It should be emphasized that 28 U.S.C. §1408 regarding case venue is permissive in nature.

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and motions, and the practice and procedure in cases under title 11.

Such rules shall not abridge, enlarge, or modify any substantive right.

A split of authority exists regarding whether the court can retain a technically improperly venued bankruptcy case upon the filing of a timely motion of a party in interest contesting the case venue, notwithstanding consideration of the standards "for the convenience of the parties" or "in the interest of justice." In spite of the absence of specific statutory authority, some courts strongly express the view, among other views, that since 28 U.S.C. § 1412 only permits a transfer to a district in which case venue is proper or improper and no statutory retention prohibition exists, a court can and should in its sound discretion, pursuant to its inherent or implicit authority, be permitted under appropriate facts and circumstances to retain a case despite technically improper venue, if doing so would be "in the interest of justice" or "for the convenience of the parties." These courts have concluded that the 1984 jurisdictional restructuring and related amendments (and gaps and omissions) did not strip the court of its inherent or implicit authority, absent a specific statutory prohibition to the contrary, to retain a case filed in the improper venue "for the convenience of the parties" or "in the interest of justice." There being no statutory prohibition against case retention, these courts thusly conclude that the authority to retain an improperly venued bankruptcy case is inherent or implied without the need for explicit statutory authorization so long as the transfer of venue provision under 28 U.S.C. § 1412 is couched in permissive rather than mandatory language (as it currently is), and retention is otherwise appropriate and "in the interest of justice" or" for the convenience of creditors, notwithstanding Rule 1014(a)(2)."[19] A procedural rule under these circumstances should not limit the court's

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[19] See also *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Company, Etc.*, 529 U.S. 193, 203 (2000), *citing United States v. Rodgers*, 461 U.S. 677, 706 (1983) ("The word 'may' when used in a statute usually implies some degree of discretion.").

inherent or implicit authority to attempt to achieve the judicial goal set forth in FED. R. BANKR. P. 1001 and also foster the public interest in facilitating and actually achieving the just, prompt, and less costly processing of bankruptcy administration. *See, for example, In re Capital Hotel Group, Inc.*, 206 B.R. 190 (Bankr. E.D. Mo. 1997); *In re Lazaro*, 128 B.R. 168 (Bankr. W.D. Tex 1991); *In re Monterey Equities-Hillside*, 73 B.R. 749 (Bankr. N.D. Cal. 1987); *In re Baltimore Food Systems*, 71 B.R. 795, 804 (Bankr. D. S.C. 1986); *In re Leonard*, 55 B.R.106, 110 (Bankr. D. D.C.1985); *In re Boeckman*, 54 B.R. 110, 111 (Bankr. D. S.D. 1985).

Other courts express a contrary, restrictive, or prohibitive per se view and hold that since 28 U.S.C. § 1412 regarding change of venue or any related bankruptcy venue statute does not expressly provide for retention of a technically improperly venued case, the court by virtue of a procedural rule, FED. R. BANKR. P. 1014(a)(2) and its accompanying Advisory Committee Note, cannot retain an improperly venued case upon the filing of a timely contested venue motion, and must either transfer or dismiss the case venue, even if retention is otherwise appropriate and clearly "for the convenience of the parties" or "in the interest of justice." However harsh or absurd the result may be in a given case, these courts steadfastly hold upon the filing of a timely contested venue motion, absolutely no discretion exists to retain an improperly venued case under any set of circumstances. Relying on a procedural rule, Rule 1014(a)(2), and its accompanying Advisory Committee Note, these courts essentially hold that since the statute, 28 U.S.C. § 1412, is silent on the retention issue, the court is completely powerless to retain improperly venued cases upon a timely motion challenging venue, and instead leave it to Congress to legislatively

resolve the matter.[20] That is, a prohibitiveper se rule is adopted by these courts in all such cases regardless of the facts and circumstances and equities of particular cases and resulting consequences. *See, for example, In re Swinney*, 309 B.R. 638 (M.D. Ga. 2004), *appeal docketed*, No. 04-12639 (11th Cir., June 3, 2004); *In re Pannell*, 243 B.R. 23 (Bankr. S.D. Ohio 1999); *In re McDonald*, 219 B.R. 804 (Bankr. W.D. Tenn. 1998)(Judge Jennie D. Latta); *In re Berryhill*, 182 B.R. 29, 31 (Bankr. W.D. Tenn. 1992)(Judge William H. Brown).

As discussed on several earlier occasions here, it once again is emphasized that there is no express statutory authority under the title 28 bankruptcy venue provisions for the court to dismiss or retain an improperly venued case upon a timely motion being filed to contest technically improper venue. Only Rule 1014(a) and its Advisory Committee note address case dismissal or retention in such a bankruptcy venue context. Likewise, there is no express statutory provision foreclosing or prohibiting the court from utilizing its inherent or implicit authority in proper circumstances from retaining an improperly venued case

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[20] If Congress eventually resorts to amendatory legislation to address this bankruptcy case retention issue, it appears to the court that the logical approach and conforming solution would be for Congress to consider substantially adopting the curing and waiving of defects provisions of prior 28 U.S.C. § 2077 entitled *Cure or waiver of defects* except for some minor changes and also, of course, with the substitution of "district court" for "bankruptcy court." That is, Congress might consider creating a new 28 U.S.C. § 1413 to add the clarifying cure or waiver of defects provisions. This suggested approach and conforming solution would be consistent with Congress' passing of 28 U.S.C. § 1408 (*Venue of cases under title 11*) superceding prior 28 U.S.C. § 1472 (except for minor changes and the substitution of "district court" for "bankruptcy court") and also 28 U.S.C. § 1412 (*Change of venue*) superceding prior 28 U.S. C. § 1475 (except of minor changes and the substitution of "district court" for "bankruptcy court"). This suggestion, if legislatively adopted, would close the existing bankruptcy case venue gap.

"for the convenience of the parties" or "in the interest of justice." There does not appear to be any indication in the scant legislative history underlying the 1984 restructuring and related amendments which would dictate a result contrary to the court's inherent or implicit authority to retain this case (or like cases) "for the convenience of the parties" or "in the interest of justice,," even upon the filing of a timely motion contesting venue. *See* generally, *for example, In re United States Aviex Co., Inc.* 96 B.R. 874 (N.D. Ind. 1981); *accord, In re Boeckman*, 54 B.R. 110 (Bankr. D. S.D. 1985) citing 1 Collier on Bankruptcy, ¶ 4.03 (15th ed).

It is said that Rule 1014(a)(2) unfortunately indulges in impermissible procedural legislation contrary to the provisions of 28 U.S.C. § 2075 by limiting the court's inherent or implicit authority and also by modifying or enlarging the scope of the enabling venue transfer provisions contained in 28 U.S.C. § 1412 to include a case dismissal provision for improper venue and concomitantly preclude, ipso facto, retention of improperly venued cases on a prohibitive per se rule basis in every case regardless of the actual circumstances or equities.[21] Accordingly, the following question, among others, is raised: Is it logical to allow considering the statutory standards of "in the interest of justice" or "for the convenience of the parties" to place the case at Memphis if the bankruptcy petition is properly filed elsewhere but if improperly filed at Memphis, not to allow it to remain there?

By way of specific factual illustration and judicial opinion comparison, in *In re Lazaro*, 128 B.R. 168 (Bankr.

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[21] De jure or de facto procedural legislation is a controversial subject. See generally, James E. Bailey, III, *Legislating Procedure in the Bankruptcy System: A Level Playing Field or Slippery Slope?* 24 UNIV. OF MEMPHIS LAW REVIEW 717 (1994).

W.D. Texas 1991) (discussed above), the Internal Revenue Service ("IRS") filed a motion to dismiss a chapter 11 case filed in the Western District of Texas, El Paso Division, or alternatively to transfer the case to the District of New Mexico for improper case venue. Debtors resided and worked in Las Cruces, New Mexico, a distant suburb of El Paso. The closest major city located approximately 39 miles north of El Paso is Las Cruces which is located in the District of New Mexico. At times relevant here, the Bankruptcy Court for the District of New Mexico only sat in Las Cruces three or four times a year, requiring parties who needed more frequent hearings to travel to Albuquerque, approximately 225 miles to the north. So inconvenient was Las Cruces for bankruptcy matters that an estimated 10% of the bankruptcy filings in El Paso were in fact made by Las Cruces residents. The bankruptcy bar in Las Cruces also was quite small, and the El Paso lawyers frequently served that market though they filed for the clients in El Paso rather than Las Cruces. The *Lazaro* court held under the existing facts and circumstances that case venue was not proper in the Western District of Texas, El Paso Division; however, the court held that it could under the totality of the particular facts and circumstances retain a case filed in an improper venue, despite contrary language found in the procedural rule, for the convenience of the parties or in the interest of justice.

This court agrees, adopts, and incorporates the reasoning and rationale of, among others, the *Lazaro* decision. Accordingly, the court finds and concludes, with all due respect to the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, that upon a determination of improper case venue, a court, in its sound discretion, pursuant to its inherent or implicit authority, on a case-by-case basis, may (1) transfer the case to another district, (2) dismiss a case "for cause" under section 707(a), 1112(b), or 1307(b), or (3)

under proper facts and circumstances retain the case for the "convenience of the parties" or "the interest of justice."

Dismissal or change of venue motions of the nature filed by the United States trustee here, absent an express statutory prohibition restricting the court's inherent or implicit authority should be dealt with on a case-by-case basis utilizing sound judicial discretion,, after considering a totality of the particular facts and circumstances of each particular case before the case is (1) dismissed, (2) transferred to another district, (3) or retained. It has been said that absent express statutory authority, the court's flexibility in venue matters and also the judicial goal set forth in FED. R. BANK. P. 1001 should not be held hostage to a prohibitive or restrictive per se procedural rule to be applied in every case regardless of the interest of justice or the convenience of, among others, the debtor's creditors, debtors, attorneys for creditors and debtors, and other parties in interest. As stated in *In re Lazaro*, 128 B.R. 175, Rule 1014(a)(2) only marginally relates to the realities of a modern day bankruptcy case (and also the obvious advantages of technological developments and resulting principles of economy). This is especially true and important when considering consumer debtors who seek relief under the Bankruptcy Code oftentimes find it difficult enough to even pay the statutorily required $209 case filing fee under 28 U.S.C. § 1930(a)-(b), much less also pay for excessive and unnecessary travel expenses to gain affordable and meaningful access to a bankruptcy court at the possible inconvenience, delay, and expense of their creditors in particular cases. The judicial outcomes of such venue motions discussed above should be based on a careful review and close scrutiny of the totality of the particular facts and circumstances of each case and consideration of basic fairness protections to allow the court to prevent inequitable abuses and unfair manipulative forum-shopping by debtors in voluntary cases and petitioning

creditors in involuntary cases. *See also, for example, In re Capital Hotel Group, Inc.*, 206 B.R. 190 (Bankr. E.D. Mo. 1997); *see also* 11 U.S.C. § 105(a) (The court may issue any order necessary or appropriate to prevent an abuse of process).

Having found that the court, in its discretion, pursuant to its inherent or implicit authority, under appropriate facts and circumstances and applicable law may retain "cases" filed in an improper district "for the convenience of the parties" or "in the interest of justice,," even if a timely motion is filed to contest venue, the court next finds that current Rule 1014(a)(2) is inconsistent with 28 U.S.C. § 2075 and also FED. R. BANKR. P. 9030 and goes far beyond the scope of the enabling statute and also unduly limits the court's inherent or implicit authority.[22] The court now turns to the critical issue involving the burden and standard of proof in dealing with and disposing of such motions under 28 U.S.C. § 1412 and FED. R. BANKR. P. 1014(a), and whether the court here should (1) dismiss this case, (2) transfer it to another venue, or (3) retain it for further administration and formal closing. The party seeking a case dismissal or a change of venue (here the movant, the U.S. trustee for Region 8) has the burden of proof, which must be carried by a preponderance of the evidence.[23]

As stated earlier, Mr. Jordan, a resident of Southaven, Mississippi, and his attorney located in Memphis, Tennessee, as a practical accommodation for themselves and also Mr. Jordan's nine nationwide creditors, selected the Western District of Tennessee at

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[22] See 28 U.S.C. § 2075, supra; see also FED. R. BANKR. P. 9030.

[23] *See, e.g., In re Commonwealth Oil Refining*, 596 F.2d 1239 (5th Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980); *In re Legend Indus. Inc.*, 49 B.R. 935 (Bankr. E.D.N.Y. 1985).

Memphis as the case venue of choice to file this chapter 7 case, as he has no creditors located in the Northern District of Mississippi. Upon the filing of this case, an automatic stay went into effect by operation of law under 11 U.S.C. § 362(a); and a bankruptcy estate also was created by operation of law under 11 U.S.C. § 541(a). On June 4, 2004, the United States trustee promptly appointed R. T. Doughtie, Esquire, of Memphis, a highly experienced and professional private panel trustee. On June 7, 2004, the notice of the commencement of this case was entered setting, among other things, the section 341(a) meeting of creditors to be held at Memphis, Tennessee on July 7, 2004. On June 15, 2004, the United States trustee filed the instant motion to dismiss this case or alternatively to transfer the venue to another district asserting that an improper venue exists under 28 U.S.C. § 1408. It should not be ignored in this case that there are no Mississippi creditors; and no creditors or other parties in interest have filed motions to dismiss Mr. Jordan's case or alternatively to transfer the case venue to another district, nor have any creditors or parties in interest made their support of the U.S. trustee's motion a part of the record.

On July 7, 2004, the Memphis Chapter 7 trustee, after performing and completing the statutory duties set forth in 11 U.S.C. § 704, filed a trustee's report of no assets. From the Chapter 7 trustee's perspective, this section 541(a) estate apparently has been fully administered.

In accordance with the court's findings and conclusions reached above, upon a determination of improper venue, the court, after close and careful scrutiny, may in its sound discretion pursuant to its inherent or implicit authority (1) dismiss the case, (2) transfer the case to any other district whether venue is proper or improper "in the interest of justice" or "for the convenience of the parties," or (3) retain the case for the convenience of the parties in interest or in the interest of justice. Having

determined that the court has the judicial discretion on a case-by-case basis to retain a technically improperly venued bankruptcy case "for the convenience of the parties" or "in the interest of justice," the last issue to address is whether the court under the totality of the facts and circumstances should (1) dismiss, (2) transfer, or (3) retain this case. Of course, to have the inherent or implicit authority to retain a case and to actually exercise such authority are entirely different issues. As discussed earlier, although Mr. Jordan resides and currently works in Southaven, he has no Mississippi creditors. Mr. Jordan and his attorney selected Memphis as their case venue of choice for obvious accommodating reasons for themselves and Mr. Jordan's creditors. No creditor or other party in interest, except for the U.S. trustee, has filed a motion to dismiss this case or to transfer it to another district (*e.g.*, the Northern District of Mississippi). Having assumed the role of "venue police" and seemingly without regard to the standards of the convenience of the parties or interest of justice in particular cases, the U.S. trustee for Region 8 is acting alone here, seeking to dismiss this case or to change the venue to another district, presumably pursuant to its generally broad standing under 11 U.S.C. § 307 and statutory supervisory role under 28 U.S.C. § 586(a)[24] to accomplish an administrative goal not contemplated under 28 U.S.C. § 1412 or the Bankruptcy Code (*i.e.*, title 11).

Additionally, it is noted that this court previously fixed September 7, 2004, as the bar date for Mr. Jordan's creditors, the U.S. trustee, and the chapter 7 trustee to file complaints objecting to his general discharge under 11 U.S.C. § 727(a) and FED. R. BANKR. P. 7001(4). If no such

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[24] *Compare* FED. R. BANKR. P. 2020,, entitled *Review of Acts by United States Trustee*, that provides: "A proceeding to contest any act or failure to act by the United States trustee is governed by Rule 9014."

complaints are timely filed, the court shall under the existing facts and circumstances forthwith grant Mr. Jordan's discharge. See FED. R. BANKR. P. 4004(C). September 7, 2004, also was fixed as the bar date for creditors to file complaints under 11 U.S.C. § 523(a)(2), (4), (6), or (15) seeking to have particular debts declared to be nondischargeable (*i.e.*, to be excepted from Mr. Jordan's general discharge). If no such complaints are timely filed under section 727(a) or section 523(a)(2), (4), (6), or (15), this case will be promptly closed in accordance with 11 U.S.C. § 350(a) and FED. R. BANKR. P. 5009. If such complaints (or, for example, contested matters governed by FED. R. BANKR. P. 9014) are filed accompanied with proper requests seeking to transfer the "proceeding" venue to a more appropriate district, the court would seriously consider such "proceeding" transfer of venue under 28 U.S.C. § 1412 and FED. R. BANKR. P. 7087 regarding the venue of one or more particular proceedings. If the "case" venue is transferred, a practical problem involving the chapter 7 trustee's fee arises. It appears that the chapter 7 trustee at Memphis has earned the full $60.00 trustee's fee. It also is noted that if the case venue is transferred to another district, it is likely the Memphis trustee will have to share some portion of the $60 fee with the Oxford or Aberdeen, Mississippi chapter 7 trustee.

The court also has considered here the following criteria that ordinarily are employed in determining whether to (1) dismiss, (2) transfer or (3) retain this case: (1) The proximity of creditors of every kind to the court; (2) the proximity of the debtor to the court; (3) the proximity of the witnesses necessary to the administration of the estate; (4) the location of the assets; (5) the economic

administration of the estate; and (6) the necessity of ancillary administration.[25]

Concluding, among other things, that FED. R. BANKR. P. 1014(a)(2) and its accompanying Advisory Committee Note are inconsistent with the applicable enabling statute[26] and also the court's inherent or implicit authority, and further concluding that the applicable enabling statute itself does not foreclose or prohibit retention of a case "in the interest of justice" or "for the convenience of the parties," the court additionally finds, after close and careful scrutiny and considering a totality of the particular facts and circumstances, that this case appropriately should be retained in the Western District of Tennessee at Memphis for further administration and formal closing (subject to possible later transfer to another district of one or more particular "proceedings" upon a timely request of a party in interest).[27] If the Chapter 7 trustee needs professional help involving, for example, Mississippi law, he can employ a professional under 11 U.S.C. § 327(a).. Transfer of this "case" to the Northern District of Mississippi would not be convenient for any of Mr. Jordan's creditors or other parties in interest. The costs, time of travel, etc. under these facts and circumstances would impose an unnecessary burden on Mr.

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[25] See, e.g., In re Commonwealth Oil Ref. Co., 596 F.2d 1239 (5th Cir. 1979), cert. den. 444 U.S. 1045 (1980); In re Walter, 47 B.R. 240 (Bankr. N.D. Fla. 1985).

[26] See 28 U.S.C. § 2075; *see also, e.g., In re Lazaro*, 128 B.R. 168 (Bankr. W.D. Texas 1991).

[27] This court sensitively recognizes that this result is not uniform with the holdings rendered under similar circumstances by my two judicial colleagues at Memphis, Bankruptcy Judges William H. Brown and Jennie D. Latta; however, with all due respect I decline to follow their holdings in *In re McDonald*, 219 B.R. 804 (Bankr. W.D. Tenn. 1998), and *In re Berryhill*, 182 B.R. 29 (Bankr. W.D. Tenn. 1992), respectively.

Jordan and his creditors and additionally unnecessarily impose upon an already very busy and highly regarded single Bankruptcy Court Judge in the Northern District of Mississippi. As mentioned earlier, Mr. Jordan's creditors are for the most part spread out nationwide and can travel to Memphis, if need be, more easily and less costly than they can travel to Oxford or Aberdeen, Mississippi (or any other location in the Northern District of Mississippi). This case is about ready to be formally closed under 11 U.S.C. § 350(a). Except for considerations of FED. R. BANKR. P. 1014(a)(2) and its Advisory Committee Note, there are simply no compelling reasons to transfer the venue of this case.

Simply put and after careful review and close scrutiny of the totality of the particular facts and circumstances existing here, retention of this technically improper venued case in the Western District of Tennessee at Memphis is "in the interest of justice" and more "convenient" for the creditors and also Mr. Jordan and his counsel, especially in light of the now very far advanced stage of this case and estate administration.[28] Dismissal of this case is simply not under the circumstances a proper option. Dismissal is likely to result in the commencement of a second chapter 7 case and its accompanying delays and costs. No parties in interest will be served by dismissal of this case for improper venue. The case retention judicial result reached here under these underlying facts and circumstances also is compatible with equitable considerations and principles as well.[29] As noted earlier, an

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[28] Perhaps it also is more convenient under these circumstances for the U.S. trustee for Region 8 to oversee this estate rather than the U.S. trustee for Region 5.

[29] In *Bank of Marin v. England*, 385 U.S. 99, 103 (1966), the Supreme Court stated:

equity court ordinarily does not favor inflexible per se rules to the detriment of deserving parties.

In summary, considering the case record as a whole, the court finds and concludes that case venue is technically improper in the Western District of Tennessee; however, "in the interest of justice" or "for the convenience of the parties," case venue shall be retained in the Western District of Tennessee at Memphis for the reasons discussed above. The U.S. trustee's motion to dismiss this case or to transfer it to another district for improper venue is hereby denied (without prejudice to, for example, traditional creditors or other traditional parties in interest seeking, if desired, a transfer of "proceeding" venue under 28 U.S.C. § 1412 and FED. R. BANKR. P. 7087 provided appropriate civil proceedings are filed with the Memphis bankruptcy court). The U.S. trustee for Region 8 has failed to carry the required burden of proof under these facts and circumstances and applicable law to warrant either a case dismissal or transfer of the venue of this case to another district. Copies of this Order shall be promptly sent to the Assistant U.S. trustee for Region 8; Mr. Jordan's attorney, Steven F. Bilsky, Esquire; and the Chapter 7 trustee. Accordingly,

IT IS SO ORDERED.

cc: Madalyn S. Greenwood, Asst. U.S. Trustee
200 Jefferson #950
Memphis, TN 38103

"Yet we do not read these statutory words [of the Bankruptcy Act] with the ease of a computer. There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction."

Steven F. Bilsky, Esquire
Attorney for Mr. Jordan
100 N. Main Bldg., #405
Memphis, TN 38103

Richard T. Doughtie, III, Esquire, Chapter 7 Trustee
239 Adams
Memphis, TN 38103

CERTIFICATE OF COMPLIANCE

Case No.

IN THE
Supreme Court of the United States

REUBEN WALTER THOMPSON AND PATRICIA J. THOMPSON;
AND LEONARD W. JORDAN

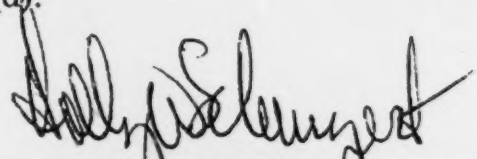
Petitioners

v.

UNITED STATES TRUSTEE, REGION 8

Respondent

As required by Supreme Court Rule 33.1(h), I certify that the petition for writ of certiorari contains 5,620 words, excluding the parts of the petition that are exempt by Supreme Court Rule 33.1(d).



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